Nos. 80-207, 80-213, 80-214

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CBS INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,

Respondents.

AMERICAN BROADCASTING COMPANIES, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,

Respondents.

NATIONAL BROADCASTING COMPANY, INC.

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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JOINT APPENDIX

(List of counsel on inside cover)

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CERTIORARI GRANTED NOVEMBER 3, 1980

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I

DOCKET ENTRIES

in the

United States Court of Appeals (D.C. Cir.)

in

CBS Inc. v. *FCC*

No. 79-2403

DOCKET ENTRIES

DATE		FILINGS—PROCEEDINGS
1979		
Nov.	28	Petitioner's petition for review of an order of the FCC
	29	Certified copy of petition for review was mailed to the FCC & Attorney General
	28	Petitioner's motion for stay and for expedited consideration on the merits
	28	Petitioner's motion for expedited consideration of motion for stay and for expedited consideration on the merits
	29	Petitioners' (ABC, CBS, NBC) motion for leave to file appendix in lieu of joint appendix
	29	Respondent's (FCC) opposition to motions for stay and for expedited consideration
	29	Motion of National Association of Broadcasters for leave to intervene
	29	Motion of National Citizens Committee for Broadcasting for leave to participate as amicus curiae
	29	Per Curiam order that the motion for stay is granted until further order of this Court and that because of the obvious complexity of the issues involved and the need of this Court to receive full and complete briefing, the consideration of the motion to expedite is deferred until the parties agree upon a briefing schedule to be submitted to the Court; Tamm, Robb and Wilkey (who did not participate), CJs
	30	Motion of Carter/Mondale Presidential Committee, Inc. for leave to intervene

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DATE		FILINGS—PROCEEDINGS
1979		
Dec.	4	FCC's motion to consolidate with Nos. 79-2406 and 79-2407
	4	FCC's motion to adopt expedited briefing schedule
	4	Certified Index to Record
	5	Clerk's order, sua sponte, that Nos. 79-2403, 79-2406 and 79-2407 are consolidated
	5	Clerk's order granting the motion of Carter/Mondale Presidential Committee, Inc. for leave to intervene
	5	Intervenor's (Carter/Mondale) opposition to motion for stay
	7	Clerk's order granting the motions of National Association of Broadcasters for leave to intervene and the motion of National Citizens Committee for Broadcasting et al. for leave to participate as amicus curiae. The request to participate in oral argument is denied without prejudice to resubmission at such time as counsel is notified of the scheduling or argument
	7	Intervenor's response to motion for stay and expedited consideration
	7	Amicus Curiae opposition to motion for stay and expedited consideration
	7	Per curiam order granting the motion to adopt expedited briefing schedule as follows: petitioner's and supporting intervenors—Dec. 7th, Respondent's and supporting intervenors—Dec. 18th and reply briefs—Dec. 21st. petitioners and supporting intervenors shall submit memoranda on or before Dec. 17th addressed to the question of mootness. Respondents and supporting intervenors shall sub-

DATE		FILINGS—PROCEEDINGS
1979		
		mit separate memoranda addressed to the same question along with their briefs on Dec. 18th. All parties on the same side are directed to file joint briefs wherever possible. These cases will be heard at oral argument during the period January 1-30th, 1980; Tamm, Robb, CJs and Wilkey, CJ (who did not participate)
Dec.	7	Petitioner's brief
	7	Intervenor's (National Assoc. of Broadcasters) brief
	12	Clerk's order granting the motion of the National Broadcasting Co. for leave to file brief in excess of page limitation
	13	Petitioner's motion for allotment of time for oral argument and for leave to permit three counsel per side to argue
	17	Petitioner's memorandum concerning the question of mootness
	18	Motion of Stewart Rawlings Mott et al. for leave to participate as amicus curiae and to participate in oral argument
	18	Motion of National Citizens Committee for Broadcasting, for leave to participate in oral argument
	18	Memorandum of Carter-Mondale Presidential Committee, Inc. on question of mootness
	18	Petitioner's (NBC, Inc.) brief
	18	Intervenor's (Carter-Mondale Presidential Committee, Inc.) brief
	19	FCC's motion for leave to file typewritten briefs, pending printing

DATE		FILINGS—PROCEEDINGS
1979		
Dec.	19	FCC's motion for leave to file brief in excess of page limitations
	19	FCC's motion for leave to file memorandum on question of mootness, time having expired
	21	Clerk's order granting respondents' motion to accept late memorandum on the question of mootness
	21	Respondents' memorandum on the question of mootness
	21	Clerk's order denying petitioners' motion for allotment of 45 minutes to present oral argument and the following times are allotted for oral argument: petitioners—30 minutes and respondents—30 minutes. The motion for leave to permit three counsel per side to argue is granted
	21	Petitioner's reply brief
	26	Petitioner's (NBC, Inc.) reply brief
	27	Clerk's order granting respondents' motion to accept late brief and in excess page limitations
	27	Respondent's brief
	27	Respondent's brief
	27	Clerk's order granting the motion of Stewart Rawlings Mott, et al. for leave to participate as amicus curiae and to adopt brief and denying the motion of National Citizens Committee for Broadcasting, et al. for leave to participate in oral argument
	27	Amicus Curiae (Nat'l Citizens and Stewart Rawlings, etc.) brief
	28	Clerk's order granting petitioner's motion to file appendix in lieu of joint appendix
	28	Petitioner's appendix

DATE		FILINGS—PROCEEDINGS
1980		
Jan.	10	Argued before SCJ Bazelon, Tamm*, CJ and CJ Markey, U.S. Court of Customs and Patent Appeals
Mar.	14	Opinion for the Court filed by Senior Circuit Judge Bazelon
	14	Concurring opinion filed by Circuit Judge Tamm
	14	Judgment that the orders of the FCC under review herein are hereby affirmed, in accordance with the opinion of this Court filed herein this date
	26	Petitioners' motion to extend time to file petitions for rehearing and suggestions for rehearing en banc to April 18, 1980
	27	Intervenor's (Carter-Mondale) conditional consent to grant of petitioners' Motion to extend time
	28	Petitioners' reply to intervenor's conditional consent
Apr.	18	Petitioners' motion for leave to file petition for rehearing exceeding page limitations
	22	Per Curiam order granting petitioner's motion to extend time and file petition for rehearing to April 21, 1980; SCJ Bazelon, Tamm, CJ and Markey, CJ, U.S. Court of Customs and Patent Appeals
	22	Intervenor's (NAB) petition for rehearing
May	15	Per Curiam order, en banc denying petitioner's motion for leave to exceed page limitations and the Clerk is directed to return the lodged copies of the petition for rehearing and/or suggestion for rehearing en banc to counsel for CBS Inc.; CJ Wright, Tamm, Robinson, MacKinnon (who would grant leave to exceed page limits), Robb, Wilkey, Wald, Mikva, and Edwards, CJ's

DATE		FILINGS—PROCEEDINGS
1980		
May	15	Per Curiam order denying the petitions for rehearing filed by NAB, ABC and NBC; SCJ Bazelon, Tamm, CJ and Markey, Chief Judge, U.S. Court of Customs and Patent Appeals
	15	Per Curiam order en banc denying the suggestions for rehearing filed by NAB, ABC and NBC; CJ Wright, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva & Edwards, CJ's
Jun.	5	Copy of letter from Clerk, Supreme Court extending the time to file petition for writ of certiorari to August 11, 1980 in S.C. No. A-1023
Aug.	13	Notice from Clerk, Supreme Court that a petition for writ of certiorari was filed in SC No. 80-207 on August 11, 1980
Nov.	5	Certified copy order from Clerk, Supreme Court granting the petition for writ of certiorari in SC No. 80-207 on November 3, 1980; consolidating with SC Nos. 80-213 and 80-214 and allotting one hour for oral argument

II

DOCKET ENTRIES

in the

United States Court of Appeals (D.C. Cir.)

in

American Broadcasting Companies, Inc. v. *FCC*

No. 79-2406

DOCKET ENTRIES

DATE		FILINGS—PROCEEDINGS
1979		
Nov.	28	Petitioner's petition for review of an order of the FCC
	29	Certified copy of petition for review was mailed to the FCC & Attorney General
	28	Petitioner's motion for expedited consideration and for temporary stay
	29	Respondent's (FCC) opposition to motions for stay and for expedited consideration
	29	Motion of National Association of Broadcasters for leave to intervene
	29	Motion of National Citizens Committee for Broadcasting for leave to participate as amicus curiae
	29	Per Curiam order that the motion for stay is granted until further order of this Court and that because of the obvious complexity of the issues involved and the need of this Court to receive full and complete briefing, the consideration of the motion to expedite is deferred until the parties agree upon a briefing schedule to be submitted to the Court; Tamm, Robb & Wilkey (who did not participate), CJs
	30	Motion of Carter-Mondale Presidential Committee, Inc. for leave to intervene
Dec.	4	FCC's motion to consolidate with Nos. 79-2403 and 79-2407
	4	FCC's motion to adopt expedited briefing schedule
	4	Certified Index to Record
	5	Clerk's order, sua sponte, that Nos. 79-2403, 79-2406 & 79-2407 are consolidated

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DATE		FILINGS—PROCEEDINGS
1979		
Dec.	5	Clerk's order granting the motion of National Association of Broadcasters for leave to intervene
	5	Clerk's order granting the motion of Carter/Mondale Presidential Committee, Inc. for leave to intervene
	5	Intervenor's (Carter/Mondale) opposition to motion for stay
	5	Intervenor's (Nat'l Assoc. of Broadcasters) response to motion for stay and expedited consideration
	7	Clerk's order granting the motions of National Association of Broadcasters for leave to intervene and the motion of National Citizens Committee for Broadcasting, et al. for leave to participate as amicus curiae. The request to participate in oral argument is denied without prejudice to resubmission at such time as counsel is notified of the scheduling of argument
	7	Amicus Curiae opposition to motion for stay and expedited consideration
	7	Per Curiam order granting the motion to adopt expedited briefing schedule as follows: Petitioner's and supporting intervenor's—Dec. 7th, Respondent's and supporting intervenors—Dec. 18th and Reply Briefs—Dec. 21st. Petitioners and supporting intervenors shall submit memoranda on or before Dec. 17th addressed to the question of mootness. Respondents and supporting intervenors shall submit separate memoranda addressed to the same question along with their briefs on Dec. 18th. All parties on the same side are directed to file file joint briefs wherever possible. These cases will be heard at oral argument during the period January 1-30, 1980; Tamm, Robb, CJ's and Wilkey (who did not participate)

DATE		FILINGS—PROCEEDINGS
1979		
Dec.	7	Petitioner's brief
	7	Intervenor's (National Association of Broadcasters) brief
	12	Clerk's order granting the motion of National Broadcasting Co. for leave to file brief in excess of page limits
	13	Petitioner's motion for allotment of time for oral argument and for leave to permit three counsel per side to argue
	17	Petitioner's memorandum concerning the question of mootness
	18	Motion of Stewart Rawlings Mott, et al. for leave to participate as amicus curiae and to participate in oral argument
	18	Motion of National Citizens Committee for Broadcasting, for leave to participate in oral argument
	18	Memorandum of Carter-Mondale Presidential Committee, Inc. on question of mootness
	18	Intervenor's (Carter-Mondale Presidential Committee, Inc.) brief
	18	Petitioner's (NBC, Inc.) brief
	19	FCC's motion for leave to file typewritten briefs, pending printing
	19	FCC's motion for leave to file brief in excess of page limitations
	19	FCC's motion for leave to file memorandum on question of mootness, time having expired
	21	Clerk's order granting respondents' motion to accept late memorandum on the question of mootness

DATE		FILINGS—PROCEEDINGS
1979		
Dec.	21	Respondents' memorandum on the question of mootness
	21	Clerk's order denying petitioners' motion for allotment of 45 minutes to present argument and the following times are allotted for oral argument: petitioners—30 minutes and respondents—30 minutes. The motion for leave to permit three counsel per side to argue is granted
	21	Petitioner's reply brief
	26	Petitioner's (NBC, Inc.) reply brief
	27	Clerk's order granting respondent's motions to accept late brief and in excess of limitations
	27	Respondent's brief
	27	Respondent's brief
	27	Clerk's order granting the motion of Stewart Rawlings Mott, et al. for leave to participate as amicus curiae and to adopt brief and denying the motion of Nat'l Citizens Comm. for Broadcasting, et al. for leave to participate in oral argument
	27	Amicus Curiae (Nat'l Citizens and Stewart Rawlings, etc.) brief
	28	Clerk's order granting petitioner's motion to file appendix in lieu of joint appendix
	28	Petitioner's appendix
1980		
Jan.	10	Argued before SCJ Bazelon, Tamm*, CJ and CJ Markey, U.S. Court of Customs and Patent Appeals
Mar.	14	Opinion for the Court filed by Senior Circuit Judge Bazelon

DATE		FILINGS—PROCEEDINGS
1980		
Mar.	14	Concurring opinion filed by Circuit Judge Tamm
	14	Judgment that the orders of the FCC under review herein are hereby affirmed, in accordance with the opinion of this Court filed herein this date
	26	Petitioners' motion to extend time to file petitions for rehearing and suggestion for rehearing en banc to April 18, 1980
	27	Intervenor's (Carter/Mondale) conditional consent to grant of petitioners' motion to extend time
	28	Petitioners' reply to intervenor's conditional consent
Apr.	22	Per Curiam order granting petitioners' motion to extend time to file petition for rehearing to April 21, 1980; SCJ Bazelon, Tamm, CJ and CJ Markey, U.S. Court of Customs and Patent Appeals
	22	Intervenor's (NAB) petition for rehearing
	22	Petitioner's petition for rehearing and suggestion for rehearing en banc
May	15	Per Curiam order en banc denying petitioner's (CBS) motion for leave to exceed page limit and the Clerk is directed to return the lodged petition for rehearing and suggestion en banc to petitioner; CJ Wright, Tamm, Robinson, MacKinnon (who would grant leave to exceed page limits), Robb, Wilkey, Wald, Mikva and Edwards, CJ's
	15	Per Curiam order denying the petitions of NAB, ABC & NBC for rehearing; SCJ Bazelon, Tamm, CJ and CJ Markey, U.S. Court of Customs and Patent Appeals

DATE	FILINGS—PROCEEDINGS
1980	
May 15	Per Curiam order en banc denying the suggestions of NAB, ABC & NBC for rehearing en banc; CJ Wright, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva & Edwards, CJ's
Aug. 18	Notice from Clerk, Supreme Court that a petition for writ of certiorari was filed in SC No. 80-213 on August 13, 1980
Nov. 5	Certified copy of order from Clerk, Supreme Court granting the petition for writ of certiorari in SC No. 80-213 on November 3, 1980; consolidating with Nos. 80-207 and 80-214; and allotting one hour for oral argument

III

DOCKET ENTRIES

in the

United States Court of Appeals (D.C. Cir.)

in

National Broadcasting Company, Inc. v. *FCC*

No. 79-2407

DOCKET ENTRIES

DATE		FILINGS—PROCEEDINGS
1979		
Nov.	29	Petitioner's petition for review of an order of the FCC
	29	Certified copy of petition for review was mailed to the FCC & Attorney General
	29	Petitioner's motion for an expedited appeal, a stay and expedited consideration
	29	FCC's opposition to motions for stay and expedited consideration
	29	Motion of National Association of Broadcasters for leave to intervene
	29	Motion of National Citizens Committee for Broadcasting for leave to participate as amicus curiae
	29	Per Curiam order that the motion for stay is granted until further order of the Court and that because of the obvious complexity of the issues involved and the need of this Court to receive full and complete briefing, the consideration of the motion to expedite is deferred until the parties agree upon a briefing schedule to be submitted to the Court; Tamm, Robb & Wilkey (who did not participate) CJs
	30	Motion of Carter/Mondale Presidential Committee, Inc., for leave to intervene
Dec.	4	FCC's motion to consolidate with Nos. 79-2403 and 79-2406
	4	FCC's motion to adopt expedited briefing schedule
	4	Certified Index to Record
	5	Clerk's order, sua sponte, that Nos. 79-2403, 79-2406 & 79-2407 are consolidated

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DATE		FILINGS—PROCEEDINGS
1979		
Dec.	5	Clerk's order granting the motion of Carter/ Mondale Presidential Committee, Inc. for leave to intervene
	5	Intervenor's (Carter/Mondale) opposition to motion for stay
	7	Clerk's order granting the motion of National Association of Broadcasters for leave to intervene and the motion of National Citizens Committee for Broadcasting, et al. for leave to participate as amicus curiae. The request to participate in oral argument is denied without prejudice to resubmission at such time as counsel is notified of the scheduling of argument.
	7	Intervenor's response to motion for stay and expedited consideration
	7	Amicus Curiae opposition to motion for stay and expedited consideration
	7	Per Curiam order granting the motion to adopt expedited briefing schedule as follows: petitioner's and supporting intervenors—Dec. 7th, respondent's and supporting intervenors—Dec. 18th, and reply briefs—Dec. 21st. Petitioners and intervenors shall submit memoranda on or before Dec. 17th addressed to the question of mootness. Respondents and intervenors shall submit separate memoranda addressed to the same question along with their briefs on Dec. 18th. All parties on the same side are directed to file joint briefs wherever possible. These cases will be heard at oral argument during the period January 1-30th, 1980; Tamm, Robb, CJ's and Wilkey, CJ (who did not participate)

DATE		FILINGS—PROCEEDINGS
1979		
Dec.	7	Petitioner's motion for leave to file brief exceeding page limitations
	7	Intervenor's (National Assoc. of Broadcasters) brief
	12	Clerk's order granting petitioner's motion to file brief exceeding page limitations
	12	Petitioner's brief
	13	Petitioner's motion for allotment of time for oral argument and for leave to permit three counsel per side to argue
	17	Petitioner's memorandum concerning the question of mootness
	18	Motion of Stewart Rawlings Mott, et al. for leave to participate as amicus curiae and to participate in oral argument
	18	Motion of National Citizens Committee for Broadcasting, for leave to participate in oral argument
	18	Memorandum of Carter-Mondale Presidential Committee, Inc. on question of mootness
	18	Intervenor's (Carter-Mondale Presidential Committee, Inc.) brief
	18	Petitioner's (NBC, Inc.) brief
	19	FCC's motion for leave to file typewritten briefs, pending printing
	19	FCC's motion for leave to file brief in excess of page limitation
	19	FCC's motion for leave to file memorandum on question of mootness, time having expired

DATE		FILINGS—PROCEEDINGS
1979		
Dec.	21	Clerk's order granting respondents' motion to accept late memorandum on the question of mootness
	21	Respondents' memorandum on the question of mootness
	21	Clerk's order denying petitioners' motion for allotment of 45 minutes to present oral argument and the following times are allotted for oral argument: petitioners—30 minutes and respondents—30 minutes. The motion for leave to permit three counsel per side to argue is granted
	26	Petitioner's (NBC, Inc.) reply brief
	27	Clerk's order granting respondent's motion to file late brief and in excess page limitations
	27	Respondent's brief
	27	Respondent's brief
	27	Clerk's order granting the motion of Stewart Rawlings Mott, et al. for leave to participate as amicus curiae and to adopt brief and denying the motion of Nat'l Citizens Comm. for Broadcasting, et al. for leave to participate in oral argument
	27	Amicus Curiae (Nat'l Citizens and Stewart Rawlings, etc.) brief
	28	Clerk's order granting petitioner's motion to file appendix in lieu of joint appendix
	28	Petitioner's appendix
1980		
Jan.	10	Argued before SCJ Bazelon, Tamm*, CJ and CJ Markey, U.S. Court of Customs and Patent Appeals

DATE		FILINGS—PROCEEDINGS
1980		
Mar.	14	Opinion for the Court filed by Senior Circuit Judge Bazelon
	14	Concurring opinion filed by Circuit Judge Tamm
	14	Judgment that the orders of the FCC under review herein are hereby affirmed, in accordance with the opinion for the Court filed herein
	26	Petitioners' motion to extend time to file petitions for rehearing and suggestions for rehearing en banc to April 18, 1980
	27	Intervenor's (Carter/Mondale) conditional consent to grant of petitioners' motion to extend time
	28	Petitioners' reply to intervenor's conditional consent
Apr.	22	Per Curiam order granting petitioner's motion to extend time to file petition for rehearing to April 21, 1980; SCJ Bazelon, Tamm, CJ and CJ Markey, U.S. Court of Customs and Patent Appeals
	22	Intervenor's (NAB) petition for rehearing
	22	Petitioner's petition for rehearing and suggestion for rehearing en banc
May	15	Per Curiam order en banc denying petitioner's (CBS) motion for leave to exceed page limit and directing Clerk to return the lodged petition for rehearing and suggestion en banc to counsel for petitioner; CJ Wright, Tamm, Robinson, MacKinnon (who would grant leave to exceed page limits), Robb, Wilkey, Wald, Mikva & Edwards, CJ's
	15	Per Curiam order denying the petitions of NAB, ABC, & NBC for rehearing; SCJ Bazelon, Tamm, CJ and Markey, Chief Judge, U.S. Court of Customs and Patent Appeals

DATE	FILINGS—PROCEEDINGS
1980	
May 15	Per Curiam order denying the suggestions for rehearing en banc of NAB, ABC & NBC; CJ Wright, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva and Edwards, CJ's
Aug. 15	Notice from Clerk, Supreme Court that a petition for writ of certiorari was filed in SC No. 80-214 on August 13, 1980
Nov. 5	Certified copy of order from Clerk, Supreme Court granting the petition for writ of certiorari in SC No. 80-214 on November 3, 1980; consolidating with SC Nos. 80-207 and 80-213; and allotting one hour for oral argument

IV

RELEVANT PLEADINGS BEFORE AND ORDER OF FEDERAL COMMUNICATIONS COMMISSION

in

Carter-Mondale Presidential Committee, Inc.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re:

ABC Television Network

CBS Television Network

NBC Television Network

To: *The Commission*

COMPLAINT

The Carter-Mondale Presidential Committee, Inc. (hereinafter the "Committee"), herewith files a political broadcasting complaint against the three television networks, ABC, CBS, and NBC, for their refusal to sell one half-hour time period to be used by the President in his capacity as a candidate for renomination by the Democratic Party for the office of President of the United States. This refusal effectively denies the candidate and his campaign committee reasonable access to the citizenry of this country via our only national commercial television network system. Furthermore, it has been reported that two candidates for the other party's nomination are also being foreclosed from utilizing the system by what is rapidly becoming a common pattern of abuse of power. This conduct of selling exclusively to commercial advertisers denies these important candidates the access to the airways mandated by Congress in section 312(a)(7) of the Communications Act of 1934 as amended. More importantly, it denies the public the opportunity of hearing and seeing the candidates in the manner which they have chosen to appear. In support, the Committee shows as follows:

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FACTS

The Commission knows that these three television networks virtually control all of prime time on more than 600 stations covering nearly all television homes in the Nation. The prime time programming of all three networks is almost exclusively devoted to entertainment programming for commercial purposes. Each network on week nights (and Saturdays) schedules six half-hour prime time periods and eight on Sundays for a three network total of 132 per week or 528 per month. Sales to commercial advertisers by the networks for these commercial time periods is a multi-billion dollar business.

The Committee requested each of the networks to provide time availabilities for the purchase of a thirty-minute prime time period between 8:00 PM and 10:30 PM EST on either December 4, 5, 6 or 7, 1979. (Attached as Exhibit A are the letter requests.) The intention of the Committee was to select one of the networks after reviewing the availabilities. In each instance, the request was denied. (Attached as Exhibit B are the letters of denial.)

As Mr. Rafshoon indicated in his letters, the Committee is seeking to use the half-hour program for an appearance by the President shortly after he formally declares his candidacy for the Democratic Party nomination for President of the United States. The proposed program would stress the President's record and that of his administration. It is intended to set forth the basic case for renomination, and thus it was desirable to air the program shortly after the announcement. It is planned to have the television appearance coincide with more than 2,000 small-donor, grass roots fundraising gatherings in communities throughout the country. A substantial amount of careful advance planning and preparation is essential to this project, thus making an immediate decision in this matter imperative.

The request of the Committee was made nearly two months in advance of the air date in order to ease the scheduling burden on the networks and to give sufficient time for appropriate announcements in such publications as *TV Guide*. Also, the time requested was selected so as not to interfere with the national ratings sweep period which is so important to network sales.

The President Is Now Or Soon Will Be
A Legally Qualified Candidate Under the FCC's Rules

Since none of the three networks are contending or basing their refusal on a claim that President Carter is not a "legally qualified candidate" at this particular time—it is not an issue here. Nevertheless, the Commission should be aware that the Committee can establish that President Carter satisfies the requirements of the Commission's rules as set forth in section 73.1940, and once the formal public announcement has been made—which will be prior to the requested air time—there should be no question whatsoever in this regard.

The Reasons Given by the Networks
for Their Refusal to Sell Are Totally
Insufficient to Justify Their Actions

The reasons advanced by the networks so far are patently insufficient to justify their actions and demonstrate that they are being unreasonable.

1) *It is "too early" to begin a presidential campaign (NBC-ABC).* This is a matter which should be viewed in light of the needs of the candidate and not the belief of the network. Actions speak louder than words. All three networks have been devoting significant amounts of news coverage to the campaigns. The NBC evening news in recent weeks has been covering the campaign with a nightly segment showing a background logo entitled "Cam-

paign 80". Apparently, the sales department of this network does not agree with the news department. ABC goes so far as to indicate they will not sell political time until next year.

2) *If we sell to you, we would have to honor requests from other candidates (NBC-CBS).* Of course this is true, but there is a relatively limited number of national candidates in either party that are willing and able to purchase network prime time half-hours. At most, there will be three in the Democratic Party and probably no more than that in the Republican Party.* At preesnt, we are aware of a total of only three in both parties who made requests—a very limited number when compared to the 528 prime time half-hour periods being sold to commercial advertisers during the month of December.

3) *It would involve "massive disruptions" of the regular entertainment and informational schedules of CBS Television Network.* This is a preposterous overstatement in light of the practical circumstances outlined above. Certainly during the month in question there may be a few half-hour periods of entertainment programming and a few commercial announcements that will be rescheduled. This is not a novel or unusual happening for any of the networks. From time to time they each preempt their own programs for others, cancel shows, and insert new programs. As far as the reference to "informational" programming is concerned, the only public affairs or informational program in the regular CBS prime time schedule is "60 Minutes" and there would appear to be no need to disrupt it.

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* Furthermore, under section 315 of the Communications Act, only Democratic Party candidates can request "equal opportunities" if this request is granted.

4) *We will not sell you a half-hour but will sell a five-minute period at 10:55 PM on Saturday night December 8th and another in the day part.* CBS is willing to provide some time. Apparently the only disagreement is over the amount and the day of airing. It is past the four day time period requested, insufficient in amount and unsuitable to the needs of the candidate. The five minutes before 11 PM on Saturday is one of the least desirable periods in the network prime time schedule. It is generally regarded as the lowest rated portion of the weekly prime time schedule. More importantly, it is totally insufficient in amount to be of use to the candidate under the circumstances. It is obviously being tendered because it would enable the network to run its full schedule of commercials for the entire half-hour in 25 minutes and then sell the additional five minutes to the candidate for a "windfall" of additional revenue.

It is indeed ironic that all prime time periods on all three networks are being devoted exclusively to the carriage of commercial messages from national advertisers—none of whom are entitled to the right of "reasonable access" which Congress accorded Federal candidates in the 1971 amendments to the Communications Act.*

What the networks have not disclosed is that they have presold virtually all their prime time commercial positions to national advertisers between now and the end of the year. They just don't wish to disturb any of these sales—even though they have complete flexibility to do so under their contracts with the advertiser. We submit that this is not a sufficient reason to refuse sales of time to Presidential candidates.

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* The Campaign Communications Reform Act of 1971 added a new subsection (7) to section 312(a) of the Communications Act creating these rights and obligations.

Further evidence of the attitude of networks toward the important responsibilities entrusted to them by the Communications Act and the actions of this Commission is found in recent news interviews with network officials and other commentary which is attached hereto as Exhibit C.

The Networks Have Refused
To Provide Reasonable Access

Section 312 provides that:

> (a) The Commission may revoke any station license or construction permit—
>
> * * * *
>
> (7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcast station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

The Commission has long recognized that the three commercial television network corporations, as licensees of the most important broadcast stations in the nation are subject to their jurisdiction. Particularly, in connection with political broadcasting matters, the FCC has said that rate restrictions, and other provisions, are applicable to networks as well as to individual stations, "since networks are, in effect, selling time on behalf of their affiliated stations." *The Law of Political Broadcasting and Cablecasting*, 43 Fed. Reg. 36342, at 36377 (1978). Thus, there is no question that the FCC has jurisdiction to resolve this matter.

In its Report and Order in Docket Number 78-102* the FCC set forth general principles in determining whether a judgment about a request for political broad-

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* *Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 43 RR2d 1029 (1978).

cast time is reasonable. The Commission made it clear that a candidate's request for a prime program is reasonable.

It should be noted that the Committee requested availabilities in order to *purchase*—not obtain free of charge—a single half hour on one of the three networks. It is not asking for the time now, but for a period in early December. It does not intend to make such purchases a regular practice. It has not made any additional requests for subsequent time, and, in part because of the expense of such time, it is unlikely that any such requests shall be made in the near future. The Committee determined that the most effective way to present the candidate and his record, at the beginning of the campaign, was to broadcast this half-hour program showing President Carter performing the duties of his office as President of the United States. All three networks disagree and have refused to sell the time, leaving the committee with no alternative but to seek relief from this Commission. The Committee suggests that this is a blatant denial of reasonable access as required by Section 312(a)(7) of the Communications Act and the FCC's interpretations of this provision.

WHEREFORE, the Committee requests the Commission to determine that the three networks have denied the Committee reasonable access and to direct the networks to make time available for purchase. Because of the need for advance planning in order to effectively use the time and minimize the impact on the networks, the Com-

mittee requests the Commission to consider this complaint on an expedited basis.

Respectfully submitted,

/s/ Timothy G. Smith
TIMOTHY G. SMITH
General Counsel
Carter-Mondale Presidential
Committee, Inc.
1413 K Street, N.W.
Washington, D.C. 20005

Of Counsel:

John D. Lane
1211 Connecticut Avenue, N.W.
Washington, D.C. 20036

Harold K. McCombs
1822 Jefferson Place, N.W.
Washington, D.C. 20036

October 29, 1979

[Certificate of Service omitted in printing]

EXHIBIT A

RAFSHOON
COMMUNICATIONS

[SEAL]

1775 Pennsylvania Avenue NW
Suite 1250
Washington, D.C. 20006
202/293-5454

October 11, 1979

Mr. Elton Rule
President
ABC
1330 Avenue of the Americas
New York, NY 10019

Dear Mr. Rule:

On behalf of the Carter/Mondale Presidential Committee, Inc., I am requesting availabilities for a thirty (30) minute program on ABC between 8:00 p.m. and 10:30 p.m. E.S.T. on December 4, December 5, December 6, or December 7, 1979. This program, to be run in conjunction with an announcement concerning his candidacy by President Carter for the Democratic nomination for President, consists of a documentary outlining the President's record and that of his administration. At the time this program is aired, it may be assumed that President Carter will be a legally qualified candidate under the Communications Act of 1934, as amended, and that the President would appear on the program.

As you know, the first official contest to select delegates to the Democratic National Convention occurs Janu-

ary 21, 1980, in Iowa, which is 47 days after December 7, 1979, our last requested date for availabilities.

Unlike all previous Presidential election years, the news media has chosen to focus enormous attention on the Florida Caucus (October 13, 1979) and Convention (November 16-18, 1979) as well as other aspects of the 1980 campaign. As illustration, I have noted that in the six-week period from September 1 through October 9, 1979, ABC devoted 51 minutes, 22 seconds to the 1980 campaign; CBS devoted 51 minutes, 17 seconds to this subject; and NBC devoted 70 minutes. Therefore, our request for the above time seems eminently appropriate in view of the escalating political climate already generated by both print and broadcast media.

I will expect to hear from one of your sales representatives within the next week regarding a selection of times in order that we may choose a mutually agreeable date.

Sincerely,

GERALD M. RAFSHOON
President

cc: Mr. Evan Dobelle
Mr. Timothy Kraft
Mr. Timothy Smith

RAFSHOON
COMMUNICATIONS

[SEAL]

1775 Pennsylvania Avenue NW
Suite 1250
Washington, D.C. 20006
202/293-5454

October 11, 1979

Mr. Fred Silverman
President
NBC, Inc.
30 Rockefeller Plaza
New York, NY 10020

Dear Mr. Silverman:

On behalf of the Carter/Mondale Presidential Committee, Inc., I am requesting availabilities for a thirty (30) minute program on NBC between 8:00 p.m. and 10:30 p.m. E.S.T. on December 4, December 5, December 6, or December 7, 1979. This program, to be run in conjunction with an announcement concerning his candidacy by President Carter for a Democratic nomination for President, consists of a documentary outlining the President's record and that of his administration. At the time this program is aired, it may be assumed that President Carter will be a legally qualified candidate under the Communications Act of 1934, as amended, and that the President would appear on the program.

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I will expect to hear from one of your sales representatives within the next week regarding a selection of times in order that we may choose a mutually agreeable date.

Sincerely,

GERALD M. RAFSHOON
President

cc: Mr. Evan Dobelle
Mr. Timothy Kraft
Mr. Timothy Smith

RAFSHOON
COMMUNICATIONS

[SEAL]

1775 Pennsylvania Avenue NW
Suite 1250
Washington, D.C. 20006
202/293-5454

October 11, 1979

Mr. John D. Backe
President
CBS, Inc.
51 West 52nd Street
New York, NY 10019

Dear Mr. Backe:

On behalf of the Carter/Mondale Presidential Committee, Inc., I am requesting availabilities for a thirty (30) minute program on CBS between 8:00 p.m. and 10:30 p.m. E.S.T. on December 4, December 5, December 6, or December 7, 1979. This program, to be run in conjunction with an announcement concerning his candidacy by President Carter for a Democratic nomination for President, consists of a documentary outlining the President's record and that of his administration. At the time this program is aired, it may be assumed that President Carter will be a legally qualified candidate under the Communications Act of 1934, as amended, and that the President would appear on the program.

As you know, the first official contest to select delegates to the Democratic National Convention occurs January 21, 1980, in Iowa, which is 47 days after December 7, 1979, our last requested date for availabilities.

Unlike all previous Presidential election years, the news media has chosen to focus enormous attention on the Florida Caucus (October 13, 1979) and Convention (November 16-18, 1979) as well as other aspects of the 1980 campaign. As illustration, I have noted that in in the six-week period from September 1 through October 9, 1979, ABC devoted 51 minutes, 22 seconds to the 1980 campaign; CBS devoted 51 minutes, 17 seconds to this subject; and NBC devoted 70 minutes. Therefore, our request for the above time seems eminently appropriate in view of the escalating political climate already generated by both print and broadcast media.

I will expect to hear from one of your sales representatives within the next week regarding a selection of times in order that we may choose a mutually agreeable date.

Sincerely,

GERALD M. RAFSHOON
President

cc: Mr. Evan Dobelle
Mr. Timothy Kraft
Mr. Timothy Smith

EXHIBIT B

ABC TELEVISION NETWORK
1330 Avenue of the Americas
New York, New York 10019
Telephone 212 887-7142

Charles C. Allen
Vice President Sales Administration

October 23, 1979

Mr. Gerald M. Rafshoon
President
Rafshoon Communications
1775 Pennsylvania Avenue NW
Suite 1250
Washington, D.C. 20006

Dear Mr. Rafshoon:

This is to confirm my oral response given on October 16th to your letter of October 11, 1979 to Mr. Elton H. Rule, President of American Broadcasting Companies, Inc., requesting air time for the Carter/Mondale Presidential Committee, Inc. on December 4, 5, 6 or 7, 1979.

As we discussed, the ABC Television Network has not reached a decision as to when it will start selling political time for the 1980 Presidential campaign, and, accordingly, we are not in a position to comply with your request. As I mentioned on the telephone, I believe that later this year a decision will be made to make political time for the Presidential campaign available on ABC-TV early next year.

It was a pleasure speaking with you last week.

Sincerely yours,

/s/ Charles C. Allen
CHARLES C. ALLEN

CCA/lh

cc: Elton Rule

NBC TELEVISION
Network

A Division of
National Broadcasting Company Inc

Thirty Rockefeller Plaza
New York, N.Y. 10020 212-664-3286

Joseph J. Iaricci
Vice President,
Sales and Administration

October 23, 1979

Mr. Gerald M. Rafshoon
President, Rafshoon Communications
1775 Pennsylvania Avenue, N.W.
Suite 1250
Washington, D.C. 20006

Dear Mr. Rafshoon:

This is in response to your letter of October 11, 1979 to Mr. Fred Silverman, on behalf of the Carter/Mondale Presidential Committee, Inc., requesting 30-minute availabilities on NBC between 8:00 and 10:30 PM, EST, on December 4, 5, 6 or 7, 1979.

We have evaluated your request carefully. Based upon our experience with past campaigns, we believe it is too early in the political season for nationwide broadcast time to be made available for paid political purposes. In addition, we believe that honoring your request at this early stage of the Presidential campaign would require NBC to honor similar requests from a number of other Presidential aspirants. The impact of such an undertaking at this time is, of course, a significant factor in our decision.

Insofar as the nomination process is now focused on political activities in individual states like Iowa, you may wish to contact stations serving those particular states.

Please be assured that NBC News will continue to cover important and newsworthy aspects of President Carter's political activities.

Very truly yours,

/s/ JI

CBS
TELEVISION
NETWORK

A Division of CBS Inc.
51 West 52 Street
New York, New York 10019
(212) 975-4321

October 17, 1979

Dear Mr. Rafshoon:

This is in response to your request that the CBS Television Network make available for purchase by the Carter/Mondale Presidential Committee, Inc., a half-hour program in prime time to be broadcast between 8:00 and 10:30 PM EST on December 4, 5, 6 or 7, 1979.

Because of the large number of present and potential candidates for the Republican and Democratic presidential nominations, we are at this time unable to accede to your request to purchase a half-hour program. We note that three Democrats and eleven Republicans have already announced, or may reasonably be expected shortly to announce, their presidential candidacies; indeed two candidates for the Republican presidential nomination have already requested to purchase half-hour programs on the CBS Television Network, and their requests have been declined on the same basis as indicated below.

In light of the above circumstances, were we to provide the half-hour program you seek, accommodating potential requests for equal treatment from other candidates for presidential nomination would involve massive disruptions of the regular entertainment and information schedule of the CBS Television Network. Accordingly, we must respectfully reject your request.

We are, however, prepared to make one 5-minute segment in prime time and one 5-minute daytime segment available for purchase by your committee. We note that

this is the same offer made to the Republican candidates referred to above in response to their requests to purchase half-hour time periods.

While we are unable to make available time on the dates you have specified, we are able to offer for your purchase a 5-minute period on December 8 between approximately 10:55 and 11:00 PM. We will also provide a specific 5-minute daytime availability for your purchase on request.

Since it is CBS' policy to sell time only to announced candidates for public office, this offer is, of course, conditional upon President Carter's having announced, or using the time purchased to announce, his presidential candidacy.

If you are interested in purchasing such a program or programs, please notify us promptly since substantial lead time of approximately four to five weeks is necessary for the editing required to accommodate program segments of this length.

Very truly yours,

/s/ Raymond E. Dillon
RAYMOND E. DILLON
Director of Political Sales

Mr. Gerald M. Rafshoon, President
Rafshoon Communications
1775 Pennsylvania Avenue N.W.
Suite 1250
Washington, D.C. 20006

cg

EXHIBIT C

NETWORKS OPPOSING POLITICAL ADS NOW

Despite Appeals for Time, Stations Don't Believe That Campaign Season Has Arrived Yet

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By LES BROWN

Although the political season has begun considerably earlier than usual, high-ranking officials of the television networks have indicated that they would prefer to wait until after the first of the year to sell air time to candidates requesting it.

Two contenders for the Republican Presidential nomination, Ronald Reagan and John B. Connally, have already made formal requests to the networks for commercial time to promote their candidacies. And Gerald M. Rafshoon, who is handling advertising for President Carter's campaign, said on Friday that he would soon advise the networks of his wish to buy 30 minutes of air time on Dec. 4, 5 or 6 for Mr. Carter's announcement of his candidacy for a second term.

While ABC, CBS and NBC have not yet denied either of the Republican requests and are still only anticipating President Carter's as yet unsubmitted application, their inclination now is to turn them all down on the ground that they have not had time to prepare their schedules for an accumulation of political disruptions.

"There is no date for a political season that any one fixes," Howard Monderer, NBC's vice president for legal

affairs in Washington, said in a telephone interview. "But we know the political season when we see it. We don't think it is here yet. The decision is a management decision, but it is based to a large extent on our sense of whether the public is ready for political campaigning."

Probable Denial in Fall

He said that NBC would probably deny the Reagan and Connally requests, "at least in the time frame they're speaking of—October and November." He said the network had not yet heard from Mr. Carter.

Specialists in the rules for political broadcasting say that the networks are under no legal obligation to clear time for candidates' requests at this time, although Section 312 of the Communications Act requires that television and radio stations allow legally qualified candidates for national office to purchase "a reasonable amount of time" in behalf of their candidacies.

The catch is in the definition of a legally qualified candidate. Under Federal Communications Commission rules, a legally qualified national candidate is one who is on the ballot in 10 states. Since it is doubtful that any of the candidates currently requesting time have met that criterion—including President Carter, who will not be an announced candidate before his proposed broadcast—the networks are free to exercise their discretion in accepting political advertising now.

Political advertising on network television has usually begun in late March or April, a time when the networks are winding down their own competitive campaigns and have begun their cycle of reruns. In the spring and summer months, network programs can be preempted for political advertising without serious consequences.

Battle of Ratings Now

At the moment, however, the three networks are engaged in a fierce battle for popularity ratings and in the delicate autumnal process of inculcating regular viewing habits in the audience. In addition, they are faced with the obligation to their affiliated stations to mount their strongest programming in November for the periodic "sweep" ratings. These are the audience ratings for individual stations around the country on which they base their future advertising rates.

Under the equal time rule of the Federal Communications Act, the networks are obliged to provide equivalent time to all legally qualified candidates requesting it if they agree to sell time to any single candidate. Thus, the sale of a half-hour to President Carter could result in as many as a half-dozen pre-emptions to other Democratic candidates. This could wreck the chances for success for certain programs or the overall programming strategy of the network.

"Nothing is absolutely firm," Eugene Mater, a vice president of the CBS Broadcasting Group, stated. "We don't like to sell time this far ahead, but we're still exploring the question. The answer may depend on what the candidate is asking for. A one-minute spot or a five-minute broadcast might be accommodated; a 30-minute program presents bigger problems."

Ellis O. Moore, vice president of public relations for ABC Television, remarked: "The issues of political advertising are always complicated. At present, we don't plan to sell until after the first of the year, but I would hesitate to say that we have baked this policy in concrete. This is going to be an unusual year. It's hard to know what other factors may come into play."

RICHARD REEVES

WHO *ARE* THESE PEOPLE?

Certain constitutional provisions concerning free speech were suspended recently by Howard Monderer. He announced in New York that the United States is not ready for debate about its political future.

"There is no date for a political season that anyone fixes," Monderer said. "But we know the political season when we see it. We don't think it is here yet. The decision is a management decision, but it is based to a large extent on our own sense of whether the public is ready for political campaining."

Monderer's statement was backed by two of his associates, Eugene Mater and Ellis Moore. The triumvirate said they were considering allowing candidates for president to speak to the nation after Jan. 1, 1980.

Who the hell are these people? Monderer is vice president for legal affairs of the National Broadcasting Company. Mater is vice president of the Broadcast Group of the Columbia Broadcasting System. Moore is vice president for public affairs of the American Broadcasting Company.

It sounds like 1984. Candidates for president want to announce those candidacies to the nation where the nation will see them, on network television. The networks, so far, have decreed that such announcements would be inconvenient and unprofitable for them at this time.

The candidates be damned. The public be damned!

Later, when it suits their purposes, the triumvirate will restore the right of public debate. Then it will be very profitable indeed.

The new television season—with its rating battles to determine next year's commercial rates—will have been well launched by then and the public will be allowed to hear Jimmy Carter, Teddy Kennedy, Ronald Reagan, John Connally and the rest. Those candidates will be allowed the privilege of paying for network time—with contributor and taxpayer money.

Catch 22. The public owns the airwaves on which the networks and local television operate at truly obscene profits. Candidates for office may pay, at premium rates, for advertising time with money raised from the public or supplied by the U.S. Treasury through matching funds provided by campaign reform laws.

But network "management" has the power over when and how the money is used. The customer is not always right.

Mondierer and friends made their arrogance about all this public a week ago because Les Brown of The New York Times asked them why the networks have refused requests by Carter, Reagan and Connally to buy time for announcements this November and December.

Brown then gave the real explanation:

"The three networks are engaged in a fierce battle for popularity ratings and in the delicate autumnal process of inculcating regular viewing habits in the audience . . . In the spring and summer months (when the networks have begun showing reruns) network programs can be pre-empted for political advertising without serious consequences."

What about the serious consequences for democracy? Should network management have the power to decide when political debate can begin? Should the networks and television stations around the country be cashing in on the debate?

The explosion in the cost of campaigning in recent years, after all, is because of television advertising rates. That's where the millions of dollars in politics go—and where public corruption comes in—the money is needed to pay for television commercials.

If politics is really the public's business, then time for political messages should be provided free. Most of the money could be taken out of campaigning and, maybe, networks and station profits could be reduced to the point that they might be only about twice as big as the profits of oil companies.

[LETTER FROM
AMERICAN BROADCASTING COMPANIES, INC.]

LAW OFFICES

McKENNA, WILKINSON & KITTNER
1150 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 296-1600

James A. McKenna, Jr.
Vernon L. Wilkinson
Joseph M. Kittner
Robert W. Coll
Thomas N. Frohock
Carl R. Ramey
Edward P. Taptich
Norman P. Leventhal
Steven A. Lerman
R. Michael Senkowski
Virginia S. Carson
Lawrence J. Movshin
James S. Blaszak
W. Kennedy Keane
Kent Y. Nakamura

November 5, 1979

Arthur L. Ginsburg, Chief
Complaints and Compliance Division
Broadcast Bureau
Federal Communications Commission
Washington, D.C. 20554

Re: Political Broadcasting Complaint
of the Carter-Mondale Presidential
Committee, Inc.

Dear Mr. Ginsburg:

American Broadcasting Companies, Inc., by its attorneys, hereby responds to the political broadcasting complaint of the Carter-Mondale Presidential Committee, Inc. (hereinafter "Committee") filed with the Commission on October 29, 1979. The Committee seeks a Commission ruling that it was unreasonable for the ABC

Television Network (and the television networks of CBS and NBC) to refuse to make time available for a 30-minute program, between 8:00 p.m. and 10:30 p.m., on either December 4, 5, 6 or 7, 1979, to be used by President Carter "in his capacity as a candidate for renomination by the Democratic Party for the office of President of the United States." *Complaint*, p. 1. The Committee asks the Commission to "direct the networks to make time available for purchase" on those dates. *Complaint*, p. 9.

The Committee's request is based on the "reasonable access" provision of the Communications Act (Section 312(a)(7)). In pertinent part, that provision states that the Commission "may revoke any station license" for "willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcast station by a legally qualified candidate for Federal elective office on behalf of his candidacy." 47 U.S.C. 312(a)(7). The question the Committee's complaint poses, however, is not whether any particular federal candidate is entitled to access, or whether any particular form of access is reasonable; rather, the question relates exclusively to *when* access should be granted.*

ABC has not taken the position that it will not make time available. ABC has simply declined to sell program time on the specific December, 1979, dates requested by the Committee. ABC respectfully submits that its determination was reasonable and consistent with the public interest.

The Commission has recently addressed the precise question presented by this complaint. *In The Matter Of*

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* The Commission may feel that not even this question is properly before it inasmuch as the request for time comes on behalf of a person who is not yet a legally qualified candidate. See *Complaint*, pp. 3-4.

Commission Policy In Enforcing Section 312(a)(7) of the Communications Act, Report and Order released July 31, 1978, 68 FCC 2d 1079, 43 RR 2d 1029 (1978). There, in attempting to provide interpretive guidance as to the "particular point during a campaign [when] a licensee's obligation to afford reasonable access begins," the Commission held that, generally, "a licensee would be unreasonable if it refused to afford access to federal candidates at least during those [statutory] time periods" when the "lowest unit charge" provision of Section 315 is applicable—i.e., 45 days prior to a primary election and 60 days prior to a general election. As to whether "reasonable access" must be afforded *before* those periods, the Commission declared that this was a determination which "must be made in each case under all the facts and circumstances present." 68 FCC 2d at 1091, 43 RR 2d at 1045.

Commenting more directly on the situation presented here, the Commission observed that it had "received no Congressional guidance as to when Section 312(a)(7) should be effective prior to a convention or caucus since the 'lowest unit charge' provision applies only before election." 68 FCC 2d at 1092, 43 RR 2d at 1045. Accordingly, and recognizing the "large variation in procedures utilized for obtaining nomination through such methods," the Commission declined to suggest any time limits on access in such situations. It simply concluded that licensees would be expected "to afford access at a *reasonable time prior to a convention* or caucus." *Id.* (emphasis added).

The 1980 Democratic National Convention is scheduled for August 11-14, more than eight months after the broadcast dates requested by the Committee. The 1980 Republican National Convention is scheduled for July 14-16.

It is also significant that the first state primary where the general public will be given an opportunity to vote for Presidential candidates occurs in New Hampshire on February 26, 1980. Presidential primaries are scheduled the following month in Massachusetts, Vermont, South Carolina (Republican Party only), Alabama, Florida, Georgia, Puerto Rico (Democratic Party only), Illinois and Connecticut. From April 1 to June 3, 1980, 25 states and the District of Columbia hold Presidential primaries. At least six primaries will be held in 1980 that were not conducted in 1976. In all, thirty-six Presidential primaries have been scheduled for 1980—34 state primaries plus the District of Columbia and Puerto Rico. See *Congressional Quarterly*, October 20, 1979, p. 2336.

Moreover, it should be recognized that the ABC Television Network, unlike any individual television station, is a national medium. The suggestion that a single state caucus (*Complaint*, Ex. A) is sufficient to trigger access to a national medium, as distinguished from individual stations in and serving that state, is misguided.

Against this background, ABC made the judgment—as it is required to do under applicable law and Commission interpretation thereof—that it would not begin to sell political time on the ABC Television Network to candidates seeking nomination at the 1980 national political conventions until sometime in calendar 1980. In our view, the nature and length of the Presidential campaign and the multiplicity of candidates participating in that campaign fully warrant this decision.

The Committee seems to suggest that the period for "reasonable access" should begin when any federal candidate merely requests broadcast time. The Committee's view is contrary to Commission interpretation reached in its 1978 *Report and Order*, conflicts with the traditional principle of committing such matters to good faith li-

censee discretion, and would lead to unreasonable practical results.

As noted, the national nominating conventions are not scheduled until late next summer, and the first Presidential primary is still nearly four months away. Following the first primary in New Hampshire, primaries are conducted in 33 states and the District of Columbia over a three month period. This nominating process is not only long and involved, it is immediately followed by an extended national election period. Throughout these many months it can be anticipated that numerous requests will be made to purchase significant amounts of advertising and program time on both network affiliated stations (located in those states where Presidential primaries are being conducted) and on the national networks supplying programming to such stations.

The decision as to when to begin to sell time is also complicated by the number of candidates potentially entitled to such time. Although the Committee has sought to minimize this factor, it cannot be so easily minimized. Once time is sold to one candidate—either program or advertising time—"equal opportunities" must be afforded to all other bona fide candidates.* Depending upon when this process begins and the number of eligible candidates, the potential disruption to normal program schedules and the resulting impact on the national television audience may be considerable.

The Committee attempts to allay these concerns by suggesting that "there is a relatively limited number of national candidates in either party that are willing and

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* While the Committee is technically correct when it states that granting its request would only result in other Democratic party candidates being immediately entitled to "equal opportunities," ABC does not believe that, in the present circumstances, it can reasonably decide to grant access to the Democratic Party without deciding to afford access to the Republican Party.

able to purchase network prime time half-hours." *Complaint*, pp. 4-5. First, there is no basis for, and neither the Commission nor the networks can rely on, this kind of supposition. ABC certainly is not in a position to judge how many of the potentially eligible candidates would be interested in or have the ability to purchase a half-hour of network program time. Second, contrary to the Committee's conclusion concerning the limited number of candidates, ABC is presently aware of at least nine candidates who have already declared for the Republican Party nomination. In addition, one major Republican leader and two major Democratic leaders (in addition to President Carter) have indicated that they will formally announce their candidacies in the next few days or weeks. Moreover, once the process has commenced, there is no way of judging whether these or additional candidates will request multiple broadcast appearances. In short, it is apparent that the potential for significant disruptions in normal schedules well in advance of the first Presidential balloting is real, not theoretical, substantial, not slight.

Finally, the Committee contends that because ABC has devoted news coverage to the candidates and early campaign activities, it is foreclosed from determining that the sale of political time should not commence until sometime after the first week of December. News coverage and paid political time cannot be equated. In fact, the news coverage ABC has devoted, and will continue to devote, to candidates and the campaign, underscores rather than undermines the reasonableness of its determination not to commence the sale of political time this year. ABC's continuing news coverage ensures that the mixture of issues, developments (including candidate announcements) and personalities that dominate this early stage of the campaign are brought to the public's attention.

The "reasonable access" provision of Section 312(a)(7) embodies a concept significantly different from the on-going news and public affairs coverage of an election campaign. In enacting Section 312(a)(7) Congress did not intend to alter the role that news coverage performs in keeping the public informed without invoking "equal opportunities" requirements. Indeed, the news exemptions of Section 315 demonstrate the intent of Congress to foster news coverage of the political process apart from the conditions under which individual candidates are afforded the opportunity to purchase broadcast time.

ABC news coverage of the Presidential election process is on-going. While it is natural that this should escalate and expand as the election year approaches, such journalistic pursuits must not be interpreted as a trigger date for the beginning of time sales under the "reasonable access" provision. To do so might influence broadcasters to make news judgments based, in part at least, on the impact that initiation of campaign coverage would have on their overall program schedules.

In responding on October 23, 1979 to the Committee's request for time, ABC indicated that a decision would be made shortly as to when political time for the Presidential campaign would be made available on ABC-TV. That decision has since been reached. ABC will make time available beginning with the first week of January, 1980.

In our judgment, such a beginning date for the availability of national political time is reasonable and accommodates all relevant interests. As a matter of comparison, in the 1976 Presidential campaign the first pro-

gram time sold by ABC was for a 5-minute program on April 23, 1976.

Respectfully submitted,

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

The Complaint of the Carter/Mondale
Presidential Committee, Inc.

To: The Commission

RESPONSE OF
NATIONAL BROADCASTING COMPANY, INC.

National Broadcasting Company, Inc. ("NBC") hereby responds to the Complaint filed with the Commission by the Carter-Mondale Presidential Committee, Inc. ("Committee") on October 29, 1979, complaining of the refusal of the ABC, CBS and NBC Television Networks to sell it a one-half hour time period on their respective networks between 8 and 10:30 PM ET on December 4, 5, 6 and 7, 1979,* to be used for President Carter's campaign.

Introduction and Summary

NBC declined the request by the Committee to purchase time only after full consideration of the various factors.

It is now as early as one year before the presidential election, and almost five months before the earliest date during the 1976 nominating period when the NBC Television Network sold its first half hour to a candidate in that campaign (March 31, 1976).

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* No other length of network time and no other dates were requested by or appear to be satisfactory to the Committee. See Complaint, pp. 3 and 6. NBC therefore did not consider such alternatives.

The equal opportunities requirement of the Communications Act requires that all legally qualified candidates for a particular office be treated equally, regardless of their significance or lack of it and no matter how unlikely may be their chance of attracting voter support. Were the NBC Television Network to sell a half hour of prime time for use by President Carter at this time, on the basis upon which the Committee claims it, there would seem to be no basis on which the Network could refuse to sell a similar time period during prime time to every one of the many legally qualified candidates for the Democratic and Republican Party presidential nominations who might make a similar request.

At this stage of the campaign, there are so many candidates or potential candidates for these Parties' nominations—at least 12 who are now or have been governors, senators or representatives, plus at least 60 others who have filed with the Federal Election Commission a notice of their candidacy for the presidential nomination of the Democratic or Republican Parties alone—that such a result could be greatly disruptive of network program service. Should the Commission rule in favor of this request it would require broadcasters for the next 10 months to comply with similar claims of a large number of other actual and potential candidates, in many of whom the public has little interest but who may be legally entitled to equal consideration to President Carter.

The rigidity of the equal time laws simply does not allow either NBC or the Commission to distinguish between legally qualified candidates. NBC has, through the years, therefore supported repeal or suspension of the equal opportunities provisions of Section 315, particularly as to candidates for nomination or election to President of the United States. "Reasonable access" re-

quirements would be interpreted in the reality of the election process, based on the significance of the election contest and of the major candidates.

NBC therefore urges the Commision to deny the complaint. NBC also urges the Commission to seek congressional repeal or suspension of the equal opportunities provisions of the Communications Act, particularly as they apply to the nomination and election to the presidency.

I. NBC WAS NOT UNREASONABLE IN DECLINING THE COMMITTEE'S REQUEST.

The question before the Commision in considering the Committee's complaint is whether NBC was unreasonable in reaching its decision. Among the standards used by the Commission in determining whether judgments in this area are reasonable are:

(a) The length of the period between the requested broadcast and the date of the election contest with respect to which broadcast time is sought. As a general rule, the Commission considers that reasonable access must be provided by the licensees serving that state, during the 45 days before that state's primary election. Here, however, national network access is sought, rather than broadcast station service to a state in which a primary election is soon to be held; the relevant contest would seem to be the national convention of the political party, which in the case of the Democratic Party will be in August, 1980.

(b) The number of candidates. Here, there are currently at least 12 actual or potential candidates for the Democratic or Republican Party nomination who have held federal elective office or been governor of a state, plus at least 60 others who have filed with the Federal Election Commission a notice of their candidacy for the

Democratic or Republican Party presidential nomination, plus more than 50 others who have filed with the Federal Election Commission a notice of their candidacy for nomination by other parties or as independents.

(c) Whether the demands of the candidates could disrupt the normal broadcast program schedules. In the case of the NBC Television Network, there are only 2 half-hour series in its regular weekly schedule, with only 7 half-hour programs in those 2 series scheduled during the remainder of the entire month of December (not counting 2 children's specials scheduled in the days before Christmas). Obviously, preemption of these 2 entire series or of one-hour programs (in order to carry a half-hour political broadcast and some hastily-scheduled filler) would be disruptive. There is simply no way for NBC or the Commission to be assured that many of the other candidates will not be legally entitled to seek and receive the same "access" as demanded here.

A. *The appropriate standard for Commission review is whether NBC's judgment is unreasonable.*

Section 312(a)(7) of the Communications Act provides that "[t]he Commission may revoke any station license or construction permit

> "for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." *

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* Paragraph 7 was added by Public Law 92-225 (the Campaign Communications Reform Act of 1971) approved February 7, 1972, 86 Stat. 3.

The Commission traditionally has emphasized that it will "rely generally on the reasonable, good faith judgments of licensees as to what constitutes reasonable access under all the circumstances present in particular cases." *Enforcing Section 312(a)(7)*, 68 FCC 2d 1079, 1093, 43 RR 2d 1029, 1047 (1978); see also, *Summa Corporation*, 43 FCC 2d 602, 28 RR 2d 768 (1973); *Anthony R. Martin-Trigona (Radio Station WGN)*, 67 FCC 2d 743, 42 RR 2d 570 (1978). In *Enforcing Section 312(a)(7)*, *supra*, the Commission reviewed the legislative and administrative history of the implementation of Section 312(a)(7) and noted specifically that "[i]n tailoring access to meet the needs of candidates for a particular office, licensees may consider such factors as the unavailability of particular classes of time; a multiplicity of candidates; the specific desires of candidates, etc." *Id.* at 1091. The Commission has also indicated it expected "licensees to afford access at a *reasonable* time prior to a convention or caucus." *Id.*, at 1092, emphasis added.

The Commission has stated its awareness that "there may be situations where the number of federal candidates in a particular election make it impossible for a station to make prime time program time available." *Id.* at 1089.

As will be shown below, NBC has taken into consideration the factors specified by the Commission, and its judgment based on these factors cannot be ruled unreasonable.

B. *Factor of timing.*

NBC's October 23, 1979 letter to the Committee explained that "[b]ased upon our experience with past campaigns, we believe it is too early in the political season for nationwide broadcast time to be made available for paid political purposes." *Complaint*, Exhibit B.

The fact is that it is now one year before the 1980 presidential election and about 10 months before the Democratic Party Convention. This compares to the 45- and 60-day periods the Commission established for stations as candidate-access periods generally applicable to primary and general elections, respectively. *Enforcing Section 312(a)(7), supra,* at 1091.

Neither the statute nor Commission precedent requires that the broadcaster invariably bow to the time demands of the first candidate who makes a "reasonable access" request. While the Commission left for case-by-case consideration what would be a reasonable period for access prior to a convention or caucus, surely it cannot be deemed legally unreasonable for a broadcaster to refuse a request so long before the event as this case involves.

Comparing the current situation to the 1976 campaign, the fact is that the earliest date on which any national television network broadcast a half-hour program of any candidate for a presidential nomination was March 31, 1976—a date four months later than that sought here.*

The Committee's letter to NBC mentioned that the first official contest to select delegates to the Democratic National Convention occurs January 21, 1980, in Iowa, which is 47 days after the last date for which it re-

* The NBC Television Network sold time on that date to Ronald Reagan, candidate for the Republican Party nomination. In this context, it should be noted that the NBC Television Network has not adopted a rigid policy of refusing to sell program time to candidates for presidential nomination. In fact, during the 1976 presidential campaign, NBC made prime time half-hour program periods available to several presidential nomination candidates prior to the national party conventions. NBC reaches its judgment on a case-by-case basis after weighing all relevant factors applicable in the particular case.

quested time (Ex. A to Complaint). This point is not made in the Complaint. As NBC pointed out in its response (Ex. B to Complaint), insofar as the nomination process is now focused on political activities in individual states like Iowa, the candidates may wish to contact stations serving those particular states, not seek national network time in states whose primaries or conventions may be scheduled on dates far into 1980.

The Democratic National Convention is 10 months away. To the extent that a candidate for that Party's nomination seeks *national* network time, it is with regard to that *national* event. If broadcast time were sought with regard to individual state primaries, conventions or caucuses, it would be more appropriate to reach the public in those states by ordering time from individual stations, not the national networks.*

In this context, it should be noted that even were the networks to carry the proferred program or the Commission to order them to do so in order to serve those few states holding early primaries, there is no assurance that individual stations would choose to broadcast it. In such cases, the networks are program distributors, not broadcasters. Stations are free to refuse the network offering (*e.g.*, see Section 73.658 (d) and (e) of the Commission's Rules). This is more than a legal nicety, since stations located in states where their local primaries are some months off may choose to decline the network offering in fear that if they accepted it, they would have to grant immediately similar access on a local basis to all the candidates in their area. This would move up the local campaigns to a point substan-

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* Indeed, it does not appear that Section 312(a)(7) applies to networks, since it applies explicitly to use of "a broadcast station" and is contained in a section of the Communications Act dealing with license revocation; networks are not a broadcast station nor are they licensed as such.

tially earlier than their individual judgments may believe warranted. This also points up the awkwardness and difficulty of a government agency overruling a network's reasonable judgment and seeking to determine "reasonable access" as a matter of law on a nationwide basis when what is really involved is a series of individual *state* primaries, caucuses, and conventions held at different times and places over a period of about 6 months.

During the preconvention period, the campaigns waged by the presidential candidates are on a state-by-state basis. They are geared to the primary elections as they occur in the various states. Thus, the need of the candidates to reach the primary voters in a state is best covered by the communications media serving that state.

C. *Factor of multiplicity of candidates.*

The Commission has recognized that the number of candidates vying for nomination or election is a factor the broadcaster may properly take into account in reaching his decision as to reasonable access. *Enforcing Section 312(a)(7), supra,* at 1090; *Hughes Tool Co.,* 42 FCC 2d 894 (1973); *Summa Corp., supra.* NBC's letter to the Committee identified this factor as a significant one in its own decision, noting that

> ". . . we believe that honoring your request at this early stage of the Presidential campaign would require NBC to honor similar requests from a number of other Presidential aspirants. The impact of such an undertaking at this time, is, of course, a significant factor in our decision" (Ex. B to Complaint).

While acknowledging the validity of this factor, the Complaint asserts that "there is a relatively limited num-

ber of national candidates in either party that are [sic] willing and able to purchase network prime time half-hours." It then claims that "at most" there will be 6, 3 in each major party. It acknowledges that two others have actually made requests already. (Complaint, pp. 4-5)

The Complaint is correct in its acknowledgment that this is a request for reasonable access, not for equal time. Under Section 315, only those contending for the nomination of a particular party are entitled to equal time to that used by a candidate for that party's nomination. But here, the request is for reasonable access under Section 312(a)(7), and the same basic principles apply to candidates for both the Democratic and Republican Party nominations.

However, the Complaint's facts and conclusions are erroneous and unjustified. Regardless of the subjective opinion of the Committee, there are at least 12 candidates for nomination (declared or expected by these two parties) who have held federal elective office or been governor of a state,* plus at least 60 other identified individuals who have taken the necessary steps toward qualification with the Federal Election Commission as candidates for nomination by the Republican or Democratic Parties to the office of the President in 1980.**

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* These are: John B. Anderson, Howard H. Baker, Jr., Edmund G. Brown, George Bush, Jimmy Carter, John B. Connally, Philip M. Crane, Robert J. Dole, Edward M. Kennedy, Larry Pressler, Ronald Reagan and Harold Stassen. The Committee does not identify the 6 it concedes would seek access.

** 33 others for nomination by the Democratic Party; 29 others for nomination by the Republican Party. The Commission can take official notice of such filings at the Federal Elections Commission which are published in a list, the latest which is dated October 29, 1979, *Candidate Cross Index* (FEC 93-1980). NBC incorporates that list by reference in this Response; in the alternative, NBC would be prepared to file with the Commission its copy of the Federal Election Commission's published list.

The Federal Election Commission lists more than 50 others who have filed notice of their candidacy for nomination by other parties or as independents. Section 73.1940(a)(4)(ii) of the Commission's Rules in effect limits reasonable access on a national basis to those candidates who have "made a substantial showing of bona fide candidacy . . . in at least ten states . . .," but neither the Commission nor NBC can, at this early stage of the campaign and one month before the requested broadcast time, determine (as the Committee assumes) that no more than 5 of these individuals would seek time equivalent to that sought by the Committee's request.* Were the Commission to base its decision on a determination that only a certain number of candidates will request time, what remedy would there be should that assumption prove erroneous?

In fact, a sale of a half-hour of time to President Carter would require NBC under the statutory equal opportunities requirements to be prepared to sell a comparable period to any of the President's legally qualified opponents for the nomination of the Democratic Party. 47 U.S.C. Section 315; *Hughes Tool Co., supra; Summa Corp., supra.* And if broadcaster judgments are to be overturned as unreasonable and prime time half-hour programs are held to be legally required for the Democrats, absent significantly different factual situations or some indication in the Commission's decision that such a decision was applicable only to Democratic candidates, logic would indicate that similar access periods also must be made available, upon request, to interested legally qualified candidates for the Republican Party presidential nomination.

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* If a candidate is legally qualified under the Commission's Rules and makes a timely request, he is entitled to his rights pursuant to Sections 315 regardless of whether the broadcaster believes he has any chance of success. *Columbia Broadcasting System*, 40 FCC 244 (1952).

The Commission has, in the past, recognized the validity of the disruptive nature of multiple political broadcasts. It has held that the broadcaster need not sell periods for political advertising which would unduly disrupt its schedule. *Letter to D. J. Leary*, 34 FCC 2d 471 (1972). It has acknowledged that "there may be situations where the number of federal candidates in a particular election may make it impossible for a station to make prime time program time available." *Enforcing Section 312(a)(7), supra*, at 1090.

If it is ever to be possible for a broadcaster to be able to take into consideration the multiplicity of candidates in reaching its determination as to reasonable access, this case requires the Commission to acknowledge the reasonableness of NBC's judgment here.

C. *Factor of disruption of the schedule.*

The enormity of the potential disruption of the NBC Television Network prime time schedule is obvious. NBC would have to hold itself available to sell a prime time half-hour to every other legally qualified candidate for the Democratic Party nomination and probably the Republican Party as well. This would be an enormous disruption of the prime time schedule, even assuming all of it was readily available for such sale.

But despite the contrary claims made at page 2 of the Complaint, NBC has scheduled only 9 prime time half-hour programs for the remainder of the month of December, 1979, starting with December 4, the first date requested by the Committee. Of these 9 programs, two are Christmas specials for children. The other 7 are programs in the only 2 regular half-hour prime time series on the NBC Television Network. Not only would these 2 series be likely to be disrputed, but presumably, unless the other candidates would be required to share

an hour,* which they usually do not like to do, NBC would have to perform "major surgery" on the remainder of its prime time schedule to accommodate other requests.

There is simply no way for NBC or the Commission to be assured that many of the other candidates are not or will not be entitled to seek and receive the same "access" as demanded here. They are not parties to this proceeding and the Commission cannot now rule on their present legal qualifications, let alone on what their status will be in a month from now. Nor can either NBC or the Commission assume that they do not now have nor will they be able to raise from others or their own assets the necessary funds to purchase the network time period. Similarly, neither NBC nor the Commission can decide to sell a particular maximum number of half-hours to the candidates (regardless of whether all candidates who seek time have received it) and call it quits. Sections 315 and 312(a)(7) simply do not work that way.

It is clear that the "reasonable access" provision does not require broadcasters to "disrupt their programming schedules." *Enforcing Section 312(a)(7), supra,* at 1090, 1096.

In this connection, it might be noted that the NBC Television Network does not generally sell individual program periods (whether 30 minutes in length or otherwise) to commercial advertisers. The usual commercial sale is of 30-second or one-minute commercial units; and no commercial advertiser may use an entire 30-minute period for its message. The NBC Television network does attempt to clear longer program periods for political candidates where that is practical and reasonable in the light of all the circumstances, and did so before the adoption of Section 312(a)(7). But to do so in the

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* Even the two regular half-hour series are back-to-back in a one-hour period.

circumstances here would not only require varying from its normal commercial format but massive disruptions in its program service.

The Commission itself has recognized that reasonable access "only requires that the licensee follow its usual commercial practices" with respect to the classes and lengths of program or spot time offered to commercial and political advertisers. *Id.*, at 1090; see also *WGN*, 58 FCC 2d 1142, 1144 (1976). More generally, the Commission has stated that Section 312(a)(7) was not designed to preempt all or most broadcast time for political purposes; that "[i]mportant as an informed electorate is in our society, there are other elements in the public interest standard, and the public is entitled to other kinds of programming than political." * *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 FCC 2d 510, 536 (1972). NBC respectfully submits that these policies have particularly cogent application to the facts and circumstances involved here.

II. THE CONGRESS SHOULD REPEAL OR SUSPEND THE EQUAL OPPORTUNITIES PROVISIONS OF SECTION 315.

The present situation is caused by the equal opportunities requirement of the Communications Act, which requires that all legally qualified candidates for a particular office be treated equally, regardless of their sig-

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* In this context, it is important to recognize that the NBC Television Network has provided the public with access to President Carter. Since January 1, 1979, President Carter has made 36 major appearances (speeches, messages, news conferences, interviews, etc.) on NBC. In addition, President Carter's picture or voice has appeared in over 100 reports in each of the NBC NIGHTLY NEWS and NBC TODAY programs since the beginning of this year.

nificance or lack of it and no matter how unlikely may be their chance of attracting voter support.

Were broadcasters able to limit their sales of time to those candidates for presidential nomination regarded as significant, they could establish some reasonable limits to the forced disruption of program schedules in order to present candidates in which the public had little or no interest. This could be done by repeal or supervision of the equal opportunities requirements, and interpretation of "reasonable access" in terms of the reality of the election process, based on the significance of the election contest and of the major candidates. NBC has, though the years, supported repeal or suspension of the equal opportunities provisions of Section 315, particularly as to candidates for nomination or election to President of the United States.

NBC therefore respectfully urges the Commission, concurrently with its denial of the Complaint because NBC has not been unreasonable, again to seek from the Congress repeal or suspension of the equal opportunities provisions of the Communications Act, particularly as they apply to the nomination and election to the Presidency.

CONCLUSION

On the facts of this case, the Commission must uphold the judgment of the NBC Television Network in declining to sell a half-hour of time between 8 and 10:30 PM ET to the Committee on December 4, 5, 6 or 7, 1979, as not unreasonable.

Respectfully submitted,

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November 5, 1979

[Certificate of Service Omitted in Printing]

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re:

Complaint of the
Carter-Mondale Presidential Committee, Inc.

RESPONSE OF CBS INC.

I. PRELIMINARY STATEMENT

This is in response to the FCC staff's oral request, on October 30, for CBS' response to an October 29 complaint by the Carter-Mondale Presidential Committee, Inc.* against CBS, NBC and ABC. The complaint arises in connection with the Committee's request to each of the networks to purchase a half hour of prime time between December 4 and 7 of this year to promote President Carter's campaign for the Democratic presidential nomination.

With respect to CBS, complainant contends that the offer of the CBS Television Network to sell the Carter-Mondale Committee two 5-minute program length segments, including one 5-minute period in prime time, is inadequate to satisfy the "reasonable access" provision set forth in Section 312(a)(7) of the Communications Act.** Thus,

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* (hereinafter "Carter-Mondale Committee," "Committee" or complainant)

** Section 312(a) provides that "The Commission may revoke any station license . . . (7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." While the provision is addressed to stations and not the networks, we believe that the CBS Television Network has, in any event, been reasonable in its offer of time to the Committee.

complainant argues that, even at this very early date in the presidential campaign, it has an absolute right to purchase a 30-minute program in prime time.

We believe that complainant's position is without legal merit. The Commission has afforded broadcasters considerable discretion in determining how they will meet their reasonable access obligations under Section 312(a)(7).* That discretion has extended to the amount of time and length of program segments to be made available to federal candidates,** as well as to determining when selling time in connection with a particular campaign will begin.***

As we will demonstrate below, the instant facts present a particularly strong case for allowing significant flexibility to broadcasters in determining how much time they will currently sell to presidential candidates. The long campaigns for presidential nomination, which will extend over the next nine months and involve 36 primary elections, have just begun—indeed, none of the three major contenders for the Democratic presidential nomination has as yet even formally announced his candidacy. Additionally, the number of contenders for the major party presidential nominations in 1980 is unusually large: at least three Democrats and 11 Republicans,****

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* See pages 13-21, *infra*.

** See pages 15-17, *infra*.

*** See pages 19-20, *infra*.

**** In addition to President Carter, Senator Kennedy and Governor Brown are now considered very likely to run for the Democratic presidential nomination. Among Republicans, Senators Baker, Dole and Pressler; Representatives Anderson and Crane; Governor Connally; former CIA Director George Bush and Harold Stassen have already announced their presidential candidacies, as has Benjamin Fernandez, a leading California businessman whose candidacy has been widely reported in the national press and who expects to wage a $15 million campaign for the Presidency. Addi-

are presently seeking, or may reasonably be expected to seek, their party's presidential nomination. Most important to consider at this time is the fundamental political reality of the presidential nominating process—that the race for convention delegates focuses largely on a series of contests in individual states.

In these circumstances, to require that a national network presently sell half-hour time periods to candidates for presidential nomination would risk significant disruption of regular network programming over the next nine months—disruptions that would affect a nationwide audience, notwithstanding the fact that only scattered local contests are presently occurring. Given these facts, and the Commission's recognition that "the public is entitled to other kinds of programming than political," * we respectfully submit that CBS' present offer of two 5-minute time periods to the Carter-Mondale Committee is fully consistent with the reasonable access provision.

II. RELEVANT BACKGROUND

In considering this complaint—and the possible consequences of a ruling favorable to the Carter-Mondale Committee—the Commission should bear in mind that rarely, if ever, has the CBS Television Network received

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tionally, Governor Reagan has stated his intent to announce his candidacy within the next several weeks, and its is reported that General Alexander Haig may shortly become a candidate for the Republican presidential nomination. Finally, many "fringe" candidates for the Presidency may be expected to emerge during the course of the campaign. In this connection, we note that, while it is uncertain how many would meet this Commission's criteria for "legal qualification," there are currently 115 individuals registered as presidential candidates with the Federal Election Commission. *See, Us Magazine*, November 13, 1979, p. 24.

* *Report and Order, Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 43 RR 2d 1029, 1042 (1978) (hereinafter "Report and Order").

so many requests to purchase program length time periods this far in advance of a presidential election. A brief summary of the requests so far received and their disposition by CBS follows.

By telegram of September 14, the Connally for President Committee requested to purchase on the CBS Television Network (1) five 5-minute time periods in prime time between October 1 and December 1, 1979; (2) a half-hour segment in prime time between October 15 and November 15; (3) comparable time with 72 hours of any "major program" on behalf of Governor Reagan; and (4) a 15-minute program between 10 AM and 2 PM on Thanksgiving Day. Although CBS declined to meet this request in light of the number of candidates for presidential nomination, it offered to sell the Connally Committee two 5-minute time periods, one in prime time and another in daytime. In accordance with this offer, the Connally Committee subsequently purchased two 5-minute programs on the CBS Television Network to air on October 30 and November 21. At the same time, the Connally Committee in an October 10 letter to CBS reasserted its position that it was entitled to purchase all of the program time it had originally requested, and further demanded equal time within 72 hours "should any of the serious unannounced candidates for the Republican or Democratic nomination be granted program time."

On September 21, the Reagan for President Committee requested to purchase a half-hour program in prime time on the CBS Television Network between November 4 and 18 (excluding four dates within that period). Once again, CBS responded by offering * one 5-minute prime

* Since Governor Reagan had not yet formally announced his candidacy, CBS' response to his request indicated that it was CBS policy to sell time only to announced candidates for public office, and its offer was accordingly made conditional on Governor

time and one 5-minute daytime segment, and once again two such programs were purchased, to air on November 13 and 14 respectively.

By letter of October 11, the Carter-Mondale Committee asked to purchase a 30-minute segment on the CBS Television Network between 8 PM and 10:30 PM EST on December 4, 5, 6 or 7. In its October 17 response, CBS offered to sell the Committee a 5-minute time period on December 8, 1979 * at approximately 10:55-11:00 PM, plus a 5-minute daytime segment at a date and time to be mutually agreed. In its letter, CBS explained that it was unable presently to grant the Committee's request for a half-hour time period in light of the multiplicity of candidates which now exists, and noted that it had responded to similar requests from two candidates for the Republican presidential nomination in an identical manner. The filing of the instant complaint followed.

Reagan's having formally announced, or using the time purchased formally to announce, his presidential candidacy. The CBS Television Network's offer of time to the Carter-Mondale Committee was similarly conditioned.

* In its complaint, the Carter-Mondale Committee criticizes CBS' offer of this time period on the ground that "[t]he five minutes before 11 PM on Saturday is one of the least desirable time periods in the network prime time schedule." Leaving aside the question of whether complainant would be entitled to demand to purchase a program length segment in prime time on a particular day of the week, *see, e.g., Report and Order*, 43 RR 2d at 1044, we note that CBS offered the December 8 availability because it was the closest date to those requested by the Carter-Mondale Committee on which a prime time program suitable for the editing necessary to accommodate a 5-minute political broadcast was planned. Although the Carter-Mondale Committee did not respond to our letter of October 17, CBS was and is prepared to negotiate with the Committee concerning the date of a 5-minute prime time broadcast.

III. DISCUSSION

1. *CBS' Decision is Reasonable*

As is apparent from the preceding discussion, the CBS Television Network has been willing, even at this early date in the 1980 campaign, to sell reasonable amounts of program time *—including prime time segments—to candidates seeking the presidential nominations of their parties. This is in accord with CBS' longstanding policy of making reasonable amounts of program and "spot" announcement ** time available for sale to political candidates to present their views and for fund raising purposes. In addition, the CBS Television Network has traditionally sold half-hour time periods to presidential candidates during general election periods and will do so again next fall.

As we have noted, however, campaigns for presidential nomination consist largely of a series of state primary elections, conventions and caucuses conducted over many months.*** Although each of these contests will obviously be newsworthy and the subject of national interest, the actual campaigns for delegates will necessarily be conducted on a local level and focus on the voters of individual states. Thus, while the CBS Tele-

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* Both industry practice and FCC precedent support the view that 5-minute segments constitute program time rather than "spot" announcements. See p. 16, *infra*.

** Although the CBS Television Network has not yet received requests to purchase "spot" announcement time from presidential candidates in connection with the 1980 campaign, it of course stands ready to make such announcements available, as it has in previous elections.

*** Thirty-four states, plus the District of Columbia and Puerto Rico, will hold presidential primaries in 1980. These primaries will begin in February and will not be completed until June 3. The national conventions will begin on July 14 (Republican) and August 11 (Democratic).

vision Network has not previously sold half-hour time periods to presidential candidates in the pre-convention period, the CBS Owned television stations have in past years made reasonable amounts of announcements and program time—including half-hour segments—available to presidential primary candidates.

At this point in the 1980 campaign, however, the CBS Television Network has made the judgment that the public interest does not require the preemption of extensive segments of its national program service for political broadcasts of half-hour duration. We emphasize again the unusually large number of candidates who are seeking the major party presidential nominations in 1980, and the concomitant likelihood that many hours of programming normally expected by the nation's viewers will in fact be disrupted if the Commission rules in favor of the Carter-Mondale Committee. In its complaint, the Committee expends considerable effort in an attempt to downplay the significance of the multiplicity of presidential candidates which presently exists. Thus, in a wholly unsupported and conclusory statement, complainant argues that "there is a relatively limited number of national candidates in either party that are willing and able to purchase network prime time half-hours." Further, the Carter-Mondale Committee assures the Commission that complainant "does not intend to make such purchases a regular practice," and that "it is unlikely that any such requests shall be made in the near future." *

* Complainant also contends that under Section 315 of the Communications Act only Democratic Party candidates could claim "equal opportunities" were the instant request to be granted. While complainant is technically correct, CBS could not under its own standards of fairness refuse to sell half-hour programs to Republican presidential candidates while making such time periods available to Democrats. Indeed, it is doubtful whether such a decision would be sustainable before this Commission.

Complainant's assertion that there will be only a "relatively limited" demand for network half-hours by presidential candidates is, of course, purely speculative. Indeed, the experience of the CBS Television Network in the 1976 presidential primary campaign would appear to cast substantial doubt on this contention. Thus, before the 1976 Democratic and Republican conventions, the CBS Television Network sold 14 five-minute time periods * to candidates for major party presidential nomination. It is reasonable to assume that, had half-hour time periods been made available by the network in connection with the primary campaigns, many of these purchases would have been of half-hour programs.

Moreover, complainant's assumption that only the most serious contenders for the Presidency will make such purchases is likewise unsupported by experience. Thus, in the 1976 primary campaign, such candidates as Ellen McCormick and Eugene McCarthy purchased program time on the CBS Television Network, with Mrs. McCormick purchasing four 5-minute segments. In the general election period, program time on the CBS Television Network was sold not only to the Democratic and Republican nominees, but also to the candidates of the Libertarian, Communist, American and Pro-Life parties, and to Eugene McCarthy running as an independent.

While the Carter-Mondale Committee presently asserts that it does not intend to make such purchases a "regular practice," and that it is "unlikely" to request further half-hours in the "near future," it obviously has no power to bind other candidates in this regard. Indeed, the fact that the campaigns for presidential nomination involve a series of important primary elections, with different candidates considering different primaries crucial to their individual campaign strategies, would

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* Twelve of these programs were broadcast during prime time.

appear to make repeated requests * for half-hour programs very likely. As noted above, the CBS Television Network has already received three requests to purchase half hours in connection with the 1980 campaign, months before such requests have normally been received in the past. It is simply illogical to assume, as complainant apparently does, that these early requests are an indication that demand for half-hours will be limited. On the contrary, we believe that the highly unusual amount of political buying of network time which has already taken place adds weight to our concern that an adverse Commission ruling on the instant complaint will lead to a substantial number of requests for prime time half-hours as the campaign gathers speed with the commencement of the vital state primaries.**

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* Each purchase of a half-hour time period would, of course, give rise to potential "equal opportunities" obligations under Section 315 of the Communications Act.

** In evaluating the total impact which a favorable ruling on the Carter-Mondale complaint is likely to have, the Commission should be aware that presidential and other federal candidates may also be expected to seek to purchase prime program time on local television stations during the 1980 primary campaigns. Moreover, in addition to federal races, gubernatorial and other state and local primary candidates are likely to request program time on local stations, and licensees may determine that such requests should in the public interest be granted. We note, for example, that primary elections for the following offices will be held within the coverage area of WCAU-TV, the CBS Owned television station in Philadelphia: (1) *Pennsylvania*: United States President; United States Senator (one seat); United States Representative (11 seats); State Attorney General; State Auditor General; State Treasurer; State Senator (12 seats in viewing area); State Representative (100 seats in viewing area); (2) *Delaware*: United States President; United States Representative (one seat); State Governor and Lt. Governor; Secretary of State; State Treasurer; State Auditor; State Insurance Commissioner;

Finally, even if the Commission were to decide, notwithstanding the circumstances outlined above, that candidates are entitled to network half-hour time periods at some point during the presidential primary campaign, we submit that there would be no basis for overturning CBS' judgment that such sales are presently premature. While complainant argues that "[t]his is a matter which should be viewed in light of the needs of the candidate and not the belief of the network," prior Commission decisions * make clear that the desires of candidates are not always paramount in this area and that broadcasters do have substantial discretion to decide when they will begin selling time to political candidates. We do not believe that the CBS Television Network's offer of 5-minute, rather than half-hour, time periods to presidential candidates nearly a year before the general election and months before the earliest state primaries can be characterized as unreasonable.

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(3) *New Jersey*: United States President; United States Representative (five seats).

Thus, the Carter-Mondale request to purchase a half-hour of network prime program time cannot be isolated from the extensive demands for political time that stations will receive from candidates for other federal, state and local offices. In this connection, we note that to the extent that the practical effect of Section 312(a)(7), by creating a favored class of federal candidates, is to limit the ability of local television stations to sell time in connection with important state and local races while still preserving the public interest in non-political programming, serious questions may be raised concerning the constitutionality of the statute. Indeed, in its recent *Report and Order* concerning enforcement of Section 312(a)(7), the Commission explicitly noted that it "[t]akes no position on the constitutionality of Section 312(a)(7) or the federal preemption of the area of political broadcasting." 43 RR 2d 1029, 1047 (1978).

* See pp. 19-20, *infra*.

2. *CBS' Decision Is Supported By Commission Precedent*

The sole issue raised by the Carter-Mondale Committee's complaint insofar as CBS is concerned is whether CBS' decision to make 5-minute rather than 30-minute time periods available for purchase by candidates at this stage of the 1980 presidential campaign is reasonable under Section 312(a)(7), as interpreted by the Commission.

There is little in the legislative history surrounding the enactment of this provision to shed light on whether the broadcast of 5-minute rather than 30-minute programs is "reasonable." * In such circumstances, we submit that it is particularly appropriate that great reliance be placed on the Commission's prior interpretations of a statute which it has been charged with administering.

While Section 312(a)(7) is a relatively recent addition to the Communications Act, we submit that Commission decisions interpreting the provision require an affirmance of the reasonableness of CBS' decision. Surely licensees have to date relied on these interpretations and have acted on them in considering requests by candidates for time. The Commission has repeatedly held that the standard of review is whether the licensee has acted *reasonably*. Thus, the Commission has stated:

> "[N]o embracing standard can be set. The test of whether a licensee has met the requirement of . . . [312(a)(7)] is one of reasonableness." **

Similarly, in its recent *Report and Order* concerning enforcement of the "reasonable access" provision, the Commission concluded:

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* See e.g., *Concerning Licensee Responsibility Under Amendments to the Communications Act Made by the Federal Election Campaign Act of 1971*, 47 FCC 2d 516 (1974).

** *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 FCC 2d 510, 536 (1972) (hereinafter *Notice*).

> "We continue to believe that the best method for achieving a balance between the desires of candidates for air time and the commitments of licensees to the broadcast of other types of programming is to rely on the reasonable good faith discretion of individual licensees." *

Thus, the Commission has stated that

> "[W]here a licensee's judgments or policies under the circumstances represent a reasonable, good faith attempt to accommodate both the right of Federal candidates to fully inform the voters of their candidacies and the interest of the public in programming other than political broadcasts, this Commission will be disposed to affirm such judgments and policies as reasonably fulfilling the obligations of a licensee under Section 312(a)(7)." **

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* *Report and Order*, 43 RR 2d 1029, 1043 (1978).

** *Summa Corp.*, 28 RR 2d 768, 771 (1973). We believe that the broad discretion which the Commission has afforded to broadcasters in the implementation of Section 312(a)(7) is particularly appropriate, since serious First Amendment questions may be raised concerning its constitutionality. Thus, in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973), the Supreme Court held that the First Amendment and the public interest standard of the Communications Act could not be read to require public access to the broadcast media for the presentation of "editorial advertising." While the Court did not reach the issue of whether the Commission or the Congress could constitutionally require such access, the Court was clearly sensitive to the First Amendment concerns which any system of mandated access would involve. Thus, the Court emphasized that the "selection and choice of material" is the essence of the editorial process (412 U.S. at 124), and went on to state:

> "The Commission's responsibilities under a right-of-access system would tend to draw it into a continuing case-by-case determinination of who should be heard and when. Indeed, the likelihood of Government involvement is so great that it has been suggested that the accepted constitutional principles

In *Letter to Paul A. Talmey,** the Commission staff affirmed a licensee's rejection of a request by a candidate for 30-minute programs during periods of "prime audience potential." The licensee had offered only 5-minute programs during such high audience time periods.** The complainant there argued, in much the same manner as the instant complaint, that "the issues which a federal candidate needs to discuss cannot reasonably be dealt with in only five minutes." The staff stated that

> "the Commission has refrained from establishing a precise definition of the 'program time' to which Federal candidates are entitled under Section 312 (a) (7). Consequently, we find that [the complainant's] claim that the licensee's offer of five-minute prime time availabilities was unreasonable since '. . . five-minutes of air time is not a program . . .' is without merit." ***

Thus, the Commission staff has acknowledged that a 5-minute program is, indeed, a program.

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against control of speech content would need to be relaxed with respect to editorial advertisements. To sacrifice First Amendment protections for a speculative gain is not warranted, and it was well within the Commission's discretion to construe the Act so as to avoid such a result." (412 U.S. at 127) (footnotes omitted).

While the instant case involves a statute enacted by the Congress, the inherent constitutional problems with a government agency dictating to broadcasters what to present and when are no less serious here than in *Democratic National Committee*. Accordingly, whatever the constitutional status of Section 312(a) (7), we respectfully submit that the Commission must interpret the statute in light of the paramount importance, recognized by the Court in *DNC*, of the editorial discretion of broadcasters.

* 31 RR 2d 1039 (1974).

** The licensee had also offered a half-hour program at 6 PM.

*** 31 RR 2d at 1311.

In another recent case, *In Re Complaint of Hon. Pete Flaherty*,* a candidate for the United States Senate sought a 4½ hour segment on a number of Pennsylvania stations for a fund-raising telethon. The Commission, in rejecting the complaint, emphasized that it would not dictate to licensees the precise manner of their compliance with Section 312(a)(7):

> "The statutory language speaks in terms of '*reasonable* access' and '*reasonable* amounts of time' rather than in any absolute terms. Similarly while our June 1974 Public Notice recognized a right of access by Federal candidates to prime time program-length time, . . . we have refrained from prescribing any precise formula for measuring licensee performance in honoring that right so as to not to interfere unnecessarily with licensee scheduling and program discretion." **

Furthermore, while the Commission has interpreted Section 312(a)(7) as requiring that program length segments be made available for purchase by federal candidates in prime audience periods, it has recognized that there are circumstances—such as the existence of a multiplicity of candidates—which may render this general requirement inapplicable. Thus, in its recent *Report and Order* the Commission stated:

> "[W]e are aware that there may be situations where the number of federal candidates may make it impossible for a station to make prime time program-time available. We have never held that the 'prime time, program-time' policy is absolute and inflexible. We will continue to make exceptions to this policy where circumstances dictate." ***

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* 31 RR 2d 255 (1974) (hereinafter "*Pete Flaherty*").

** *Id.* at 272.

*** 43 RR 2d at 1043.

Here, of course, the CBS Television Network has not declined to provide prime time program time but only half-hour time periods.

In attempting to belittle the significance of potential disruptions of regular network programming resulting from the sale of half-hour programs to candidates for presidential nomination, the Carter-Mondale Committee contends that "[t]he prime time programming of all three networks is almost exclusively devoted to entertainment programming." * The Commission has repeatedly recognized, however, that there is a public interest in the presentation of a licensee's normal programming, and that a licensee is not obligated to preempt such programming solely because a candidate believes that a particular program length serves his interest.** Thus the Commission has stated:

> "Important as an informed electorate is in our society, there are other elements in the public interest standard, and the public is entitled to other kinds of programming than political." ***

Indeed, in *Pete Flaherty* the Commission rejected the complainant's suggestion that the "licensees be called upon to explain '. . . why the public interest is better served by presentations of old movies or network reruns than an attempt from an aspirant to the . . . [U.S.

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* In this connection, we note parenthetically the obvious fact that CBS News provides very significant coverage of presidential candidates and their views in its regular news and public affairs broadcasts, and in news interview broadcasts such as FACE THE NATION.

** *See, e.g., Hon. Donald W. Riegle*, 38 RR 2d 1343 (1976); *Paul A. Tamley*, 31 RR 2d 1309 (1974); *James H. Doyle*, 38 RR 2d 330 (Bdcst. Bureau 1976).

*** *Report and Order*, 43 RR 2d at 1042, quoting *Notice*, 34 RR 2d at 536.

Senate] . . . to reach the public.' " The Commission stated that

> "[O]ur scope of review over licensee action in this area is narrow, and, were we to call upon licensees to justify their programming selections or program scheduling, the matter would come down to a judgment as to what was presented, and when, as against what should have been presented, and when—a judgmental area for licensees exercising their sound journalistic discretion and one which this Commission must avoid." *

The reasonableness of CBS' decision not to sell half-hour programs to presidential candidates at this point in the campaign is further indicated by Commission decisions sustaining the exercise of licensee discretion as to when to begin selling time to candidates in federal elections. Thus, in *Matter of Anthony R. Martin-Trigona,*** a candidate in a primary for United States Senator complained under Section 312(a)(7) of a broadcaster's refusal to sell him announcement time until forty-five days before the election. In rejecting this complaint, the staff stated:

> "A licensee's discretion in providing coverage of elections extends not only to the type and amount of time to be made available to candidates, *but to the date on which its campaign coverage will commence.* A licensee's decision not to accept political advertising until 45 days before a primary election cannot be said to be an unreasonable refusal to devote adequate coverage to a significant and important election, and does not constitute a denial of

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* 31 RR 2d at 273.

** 66 FCC 2d 968 (Bdcst. Bureau 1977), aff., 41 RR 2d 1607 (1977).

> reasonable access to a candidate for Federal office. The fact that stations in other cities in the state have sold time for political announcements seven months in advance of the election does not render unreasonable a contrary determination by any other licensee."

Similarly, in a separate case involving the same candidate, the Commission sustained a licensee's determination not to sell time in connection with a March senatorial primary until January 1.*

Although there are obvious differences between a campaign for the U.S. Senate and the Presidency, we stress once again that CBS has not refused to sell prime time announcements and program length segments to the complainant. Rather, it has declined presently to sell half-hour time periods. A Commission ruling requiring that half-hour programs be made available at this point in the campaign would, in our view, be simply irreconcilable with the Commission decisions cited above.**

Finally, it should be emphasized that the Commission's role here is not to "substitute its judgment for that of the licensee, but, rather, . . . [to] determine in any case

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* *In re Anthony R. Martin-Trigona*, 42 RR 2d 570 (1978).

** While complainant has ctied no Commission decision in support of its contention that it is presently entitled to purchase half-hour program segments, a 1976 oral ruling by the Commission on a complaint by Senator Frank Church may be thought relevant to the present facts. In that case, the Commission found that an Oregon television station had failed to comply with the "reasonable access" provision by declining Senator Church's request to purchase a half-hour prime time program on the eve of the Oregon Democratic presidential primary. Whatever the merits of the Commission's ruling on the Church complaint, it is clearly distinguishable from the instant situation, since the earlier case involved the efforts of a Presidential candidate to purchase time on a local station, in connection with a local primary, immediately before the election in question.

that may arise whether the licensee can be said to have acted reasonably and in good faith." * Thus, the standard of review is not whether the Commission necessarily agrees with CBS' decision, but whether the Commission concludes that CBS' decision was unreasonable as a matter of law.

CONCLUSION

CBS is cognizant of its responsibility as a broadcaster to serve the public interest by providing information about those seeking the nomination for this country's highest public office. We also are aware of the important role fund-raising plays in the political process. In light of these considerations, the CBS Television Network has made available programs of 5-minutes duration—in prime and non-prime hours—for purchase by candidates during this pre-primary phase of the 1980 presidential campaign.

In ruling on this complaint, the Commission need go no further than deciding whether, as a matter of law, CBS' actions in this matter amount to an abuse of its legitimate discretion. We think the Commission's prior cases make clear that no such abuse of discretion is here in issue.

Accordingly, for all the reasons set forth herein, we respectfully urge the Commission to reject complainant's request that the Commission direct the CBS Television

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* *Notice*, 34 FCC 2d at 536.

Network to make 30-minute programs available to the Carter-Mondale Committee.

Respectfully submitted,

CBS INC.

By /s/ Ralph E. Goldberg
RALPH E. GOLDBERG

By /s/ Howard F. Jaeckel
HOWARD F. JAECKEL

Its Attorneys

51 West 52 Street
New York, New York 10019

November 6, 1979

cc Timothy G. Smith, Esq.
General Counsel
Carter-Mondale Presidential
Committee, Inc.
1413 K Street, N.W.
Washington, D.C. 20005

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re:

ABC Television Network

CBS Television Network

NBC Television Network

To: *The Commission*

REPLY OF CARTER-MONDALE PRESIDENTIAL COMMITTEE, INC.

The networks' responses show that the Committee's complaint presents the Commission with important questions of statutory interpretation, which it has not yet had the opportunity to address in a specific context, as to the meaning and intent of the candidate access provisions of Section 312(a)(7). The reasons set forth by the networks for their refusals to sell a one half-hour time period provide, in fact, no justification whatsoever under the statute for their actions. What the networks are really telling the Commission is that, for reasons of their own business convenience, they are not prepared to alter their normal commercial operations and are not required to do so by the Act. If this narrow view is sustained, the Commission essentially will be announcing that, contrary to the intent of Congress, Section 312(a)(7) has virtually no force or meaning.

Due to the urgency of this matter and need for a decision sufficiently in advance of the several alternative dates on which time has been sought, it is requested that the Commission address these questions in an open meeting and rule no later than Wednesday, November 14, 1979.

I. *The Networks Ignore the Obvious—This Country's Most Important Political Campaign is Now Underway*

Contrary to the claims of the three networks:

—It is not too early to sell a network half-hour prime time program period. The campaigns now underway to be a party's Presidential candidate are not a series of isolated, local elections, but integrated, nationwide efforts.

—There is not a "multiplicity of candidates" at this time.

—Network entertainment programming will not be unduly disrupted.

First, the simple fact is that the national Presidential campaign is now well underway.* Whether this is philosophically desirable or not, it must be accepted by the Commission and the networks as a fact of life.** This differentiates "Campaign 80" (as characterized by one of the networks) from previous election years and means that the networks cannot simply follow their prior

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* CBS altered or "disrupted" its regular programming schedule to move its one hour CBS Reports program "Teddy", about Senator Kennedy, from Wednesday, November 7, 1979 to Sunday, November 4, 1979 because Senator Kennedy scheduled the formal announcement of his candidacy on November 7, 1979. *Washington Post*, November 3, 1979, p. B-1, 5. As to the announcement, CBS news reported that the Kennedy campaign is now getting into "full swing". In addition, the Des Monies Register and Tribune Company is sponsoring a debate on January 7, 1980 between President Carter and Senator Kennedy, which is expected to receive nationwide coverage. *Washington Post*, November 7, 1979, p. A-1.

** The Commission has recognized that "a presidential campaign may be in full swing almost a year before an election." *Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 F.C.C.2d 1079, 1091 (1978) (hereafter *Enforcing § 312 (a)(7)*). Election Day, 1980 is one year away this week.

practices. In essence, at least two of the networks agree. ABC thinks that the first week in December, 1979 is too early to sell program time, yet one month later—after the Christmas sales season is over—is acceptable to it. CBS agrees that it is appropriate to sell program time now. Its only concern is the amount of time to sell.*

Precisely because the Presidential campaign has started and is so intense, it is particularly unreasonable for the networks to delay selling time until later. The Committee had explained that its reason for seeking a half-hour program, immediately after President Carter formally announces his candidacy, is to present in a detailed and thoughtful manner the administration's record and set the tone for the entire campaign. This purpose could not be accomplished later.

It is unrealistic even to suggest that the Presidential electoral process leading up to the conventions is merely a series of isolated, local and state matters, better dealt with by individual stations. While the pre-convention period focuses on obtaining delegates from the various states, in reality Presidential nominating campaigns are nationwide in scope. Moreover, as network commercial advertisers are well aware, the purchase of network time is the most cost-effective way to reach people. This is a particularly important consideration, given the re-

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* CBS has rejected the requests of *three* Presidential candidates to purchase half-hour programs. Its response was to offer 2 five-minute programs. This has a certain appearance of magnanimity. However, CBS' counter-offer is a clear refusal to sell the Committee the length, day and time period program which would satisfy the Committee's needs. Obviously, CBS did not take into consideration the "candidate's desires as to the method of conducting his or her media campaign." *Enforcing § 312(a)(7)*, 68 F.C.C.2d at 1089, n. 14. It offered a so-called program time unit which it does not sell to its regular commercial customers and which is not even considered a normal program unit by industry standards. See *Humphrey For President Campaign*, 34 F.C.C.2d 471 (1972).

strictions on campaign contributions and expenditures under the election reform laws, of which § 312(a)(7) is only one provision.

Second, it is equally incorrect to contend that there is a "multiplicity of candidates" problem at this time. To support this contention, the networks point to three Democratic candidates and about 11 Republican candidates. This is not an inordinate number, particularly when the Presidency of the United States is the most important elective office in this country and when the networks have access obligations only toward candidates for that office.*

Even assuming that all 13 other candidates would desire to make a similar purchase in December, 1979 (an assumption the Committee does not accept), the three networks would have to make only one half-hour, per week, per network available.** This would involve only 13 additional prime-time half-hours out of a total of 528 prime-time half-hours over any four week period. This is only 2.5% of the total December television time under the networks' effective control.

Furthermore, because the networks would be acting on behalf of their affiliates, they would be assisting in-

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* In contrast, CBS has pointed out the numerous federal offices, in three states, towards which its O & O, WCAU-TV, Philadelphia has access responsibilities. (CBS Response, p. 11, footnote). This is no doubt typical of the responsibilities of other network O & O stations as well as network affiliated, independent and educational stations across the United States. Individual stations have to be concerned with a larger number of federal offices than the networks, without even considering the stations' obligations toward state and local elections.

** While the Committee requested availabilities on all three networks, it seeks to purchase a half-hour program on only one of the networks. Because of the very high costs involved, there is no reason to believe that other candidates would act differently.

dividual stations (who have access obligations covering many other federal elections) in meeting a good portion of their access obligations toward these Presidential candidates. As it stands now, the networks by their intransigence do a disservice to their affiliates.

Finally, the validity of a "disrupted program schedule" defense is most questionable, even were the potential for disrupting the networks' entertainment programming schedules substantial (which is not the case here). The Committee felt that it gave the networks considerable leeway in providing availabilities. The possibility that other candidates, from both parties, might request time is speculative at this point. Moreover, the networks admit that ultimately they must make scheduling changes and, in fact, now do so with regularity for their own commercial purposes.

II. *The Reasons Given by the Networks for Their Refusals are, in Fact Reasons to Grant the Request*

All three networks argue that they should not be required to sell the Committee a one half-hour period at this time because it is too early in the campaign and there is a multiplicity of candidates. As shown above, these concerns are not borne out by the facts. But even if it were assumed otherwise, they provide little support for the networks' position. If a true "multiplicity of candidates" problem existed, there would at least be a responsibility to try to solve the problem to the maximum extent possible, particularly where a Presidential candidate's statutory rights are involved. One of the best ways to do this would be to start selling or making available time early in the campaign to maximize opportunities and minimize disruptions.

The networks cannot have it both ways. If there are a large number of potential candidates, they should ad-

just their selling practices accordingly to accommodate candidates' anticipated needs. On the other hand, if the networks really believe that the campaign period has not started yet, then they must be prepared to accept the consequences of disrupted schedules (in line with their restricted view of the campaign period) when there is less time left to meet candidates' needs.

Moreover, of all the broadcasters in this country, the networks are in the weakest position to raise a "multiplicity of candidates" defense to making time available to candidates. Unlike other licensees, the networks as the national medium have only one group of candidates to serve (Presidential candidates).* And from the practical standpoint, the networks have access to at least two-thirds of the available hours on affiliated stations. Therefore, they have more time under their effective control than does the typical station in which to meet their one statutory obligation to candidates for this uniquely important office.**

III. *The Networks Place Excessive Reliance On The Traditional Licensee Discretion Concept*

The networks defend their refusals to sell time as a reasonable exercise of the broad discretion accorded them under the Communications Act. They fail to recognize, however, that the traditional concept of licensee discretion in making time available to candidates was modified by Congress in enacting Section 312(a)(7) as

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* This office also happens to be the most important from the standpoint of the public whose interests are paramount here.

** On the other hand, other licensees, in addition to the Presidential candidates in state primaries, will have "reasonable access" obligations to numerous congressional and senatorial candidates, as well as basic licensee obligations to important state and local candidates. See page 4, *supra*.

far as federal candidates were concerned.* The addition of this provision was not just a limited amendment to the Communications Act but an important component of the most comprehensive statutory reform of the entire federal elective process in nearly fifty years. As reflected in the accompanying legislative history, the need for this reform was occasioned in large measure by the increasing role and cost of broadcasting and particularly the critical importance of television to the entire electoral process.**

The legislative history surrounding this reform clearly demonstrates that Congress was dissatisfied with the *status quo* under the then existing Communications Act which placed great reliance on the concept of licensee discretion in serving the needs of candidates.*** There can be no doubt but that the essential purpose of enacting Section 312(a)(7) was to place new and additional obligations on broadcasters with respect to candidates for federal elective office.

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* The Committee is seeking to *purchase* a half-hour program. In this context, Section 312(a)(7) requires that candidates be accorded the right to purchase "reasonable amounts of time." This is to be contrasted with other provisions of the Communications Act which have been traditionally interpreted to afford licensees far greater discretion in their activities.

** That Congress appreciated and was concerned over this role is shown by its first effort in 1970 which concerned itself solely with political broadcasting. It was vetoed on the ground that a more comprehensive approach covering other media and electoral problems was required.

*** Under the then existing statutory scheme, the Commission's role was generally limited to reminding broadcasters of their general statutory obligation to make time available to political candidates in accord with their reasonable, good faith judgment of the situation. See, *Public Notice, Licensees Reminded Of Statutory Obligations In Contributing Time To Political Campaigns*, 13 RR 2d 1216 (1968).

Thus, in reporting the measure to the Senate, the Committee on Commerce unequivocably stated that it sought ". . . to give candidates for public office *greater* access to the media so that they may better explain their stand on the issues and thereby more fully and completely inform the voters." * It is particularly noteworthy in this respect that every specific ruling cited by the networks in defense of their refusals predate the Commission's 1978 *Policy Statement, (Enforcing § 312(a)(7))*, which accepted and restated this view.

We readily concede that the networks and other licensees need to have some latitude in handling requests for political time. But by the same token, we believe that the networks must also concede that the traditional role of the licensee in these matters has been significantly modified by the actions of the Congress in addressing, in a most comprehensive way, this country's basic electoral process.**

CONCLUSION

For these reasons and for those stated in our initial complaint, the facts of this situation require the Commission to determine that the three networks have failed ". . . to permit purchase of reasonable amounts of time

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* Report of the Senate Committee on Commerce on S.382 (P.L. 92-5), page 20 (emphasis added).

** For example, as far as the time period for the conduct of federal campaigns is concerned, Congress specifically rejected proposals to limit the length of the campaign period (as is done, for example, in Great Britain) but instead contemplated that candidates would determine this period, provided the Federal Election Campaign Act and the rules and regulations of the Federal Election Commission are satisfied. The Committee believes it is simply unlawful to permit the networks effectively to make judgments which were not even entrusted to the federal agency responsible for the supervision of the electoral process.

. . ." and accordingly direct the networks to make time available for purchase.

Respectfully submitted,

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November 7, 1979

[Certificate of Service Omitted in Printing]

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Complaint of the Carter-Mondale
Presidential Committee, Inc.

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters (NAB) urges the Commission to find that the refusal by the three major television networks, ABC, CBS and NBC, to sell the Carter-Mondale Presidential Committee a half-hour of prime time for nationwide broadcast was neither unreasonable under Section 312(a)(7) of the Communications Act[1] nor an abuse of the journalistic discretion properly vested in their stations as licensees.

NAB is a private nonprofit, incorporated association of radio and television broadcast stations and networks. As of November 7, 1979, NAB's membership included 2,553 AM radio stations, 2,030 FM radio stations, 600 television stations and the major nationwide commercial broadcast networks. Because the FCC's action on the complaint will have an impact on all radio and television stations, NAB is submitting these comments, as an *amicus curiae*, to underscore the interest of broadcast licensees in this proceeding. We urge the FCC not to take any action which unduly circumscribes the reasonable good faith judgment of broadcast licensees.

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[1] Section 312(a) provides that: "(a) The Commission may revoke any station license . . . (7) For willful or repeated failure to afford reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." Significantly, Section 312(a) is directed to stations rather than to the networks.

I. *The Reasonable Access Requirement Should Be Interpreted in Light of the First Amendment Interest in Shielding a Broadcaster's Journalistic Decision from Government Second-Guessing.*

The reasonable access requirement is essentially a codification for Federal candidates for public office of "the Commission's prior interpretation of Section 315 (a) as requiring broadcasters to make time available to political candidates." [2] Congress recognized that the rights of Federal candidates to time should not be absolute and provided that *licensees* could limit such candidates to a "reasonable" amount of broadcast time. However, even though Congress provided little guidance on the meaning of the phrase "reasonable," it empowered the FCC to revoke the license of any station for "willful or repeated failure" to comply with Section 312(a)(7). With the sanction of license revocation expressly contained in Section 312(a)(7), the potential for government harassment is indeed significant.

A mounting series of court decisions have upheld the vital First Amendment interest in shielding journalistic decisions made by broadcasters and newspaper publishers from Government second-guessing. In the landmark *CBS vs. DNC* case, the U.S. Supreme Court warned against "the risk of an enlargement of Government control over the content of broadcast discussion" as well as the dangers of Government oversight of "the day-to-day operations of broadcasters' conduct." [3] The Court observed that "[r]egimenting broadcasters is too radical a ther-

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[2] *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 113-114 n. 12 (1973). *See also* S. Rep. No. 96, 92nd Cong., 1st Sess. (1971) and 117 Cong. Rec. S12872 (daily ed. Aug. 2, 1971).

[3] 412 U.S. at 126-127.

apy"[4] and emphasized the importance of providing licensees with the utmost discretion:

> "For better or worse, editing is what editors are for; and editing is selection and choice of material."[5]

The issue of Government review of a licensee's journalistic judgment was also addressed by the Supreme Court in a decision invalidating a Georgia privacy law on the ground that it infringed upon the First Amendment right of the petitioning broadcast station to report information disclosed during a criminal trial. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). Citing its decision in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (invalidating on First Amendment grounds a Florida statute providing a right of access for candidates to newspapers), the Court concluded: "In this instance as in others, reliance must rest upon the judgment of those who decide what to publish or broadcast." *Cox* at 496.

The necessity of giving the licensee a substantial amount of leeway on matters relating to issues of importance to the electorate was underscored by the U.S. Court of Appeals for the District of Columbia Circuit in *Strauss Communications, Inc. v. FCC*:[6]

> The abiding First Amendment difficulties, however, along with an appreciation of Congress' intent in enacting the Communications Act, have engendered an important corollary: the licensee is to have the maximum editorial freedom consistent with its position as public trustee of a portion of the airways.

Accordingly, it is of utmost importance that the reasonable access provision be interpreted by the Commission

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[4] *Id.*

[5] *Id.* at 124.

[6] 530 F.2d 1001, 1008 (D.C. Cir. 1976).

in this case in light of a standard which gives great weight to the editorial discretion of broadcasters.

II. *The Commission Should Continue to Defer to the Reasonable, Good Faith Judgment of Licensees.*

For the Commission to rule in favor of the complainant would clearly require that it substitute its own judgment for that of the networks. While the Carter-Mondale Presidential Committee would like to place the burden of justification on the broadcaster, this approach is wrong as a matter of law. The Commission has emphatically stated, again and again, that it will not overturn a licensee's good faith discretionary judgment unless it is clearly unreasonable in light of all the facts and circumstances. This policy was initially stated by the Commission in a 1972 Public Notice entitled *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*:[7]

> The test of whether a licensee has met the requirements of the new section is one of reasonableness. The Commission will not substitute its judgment for that of the licensee, but, rather, it will determine in any case that may arise whether the licensee can be said to have acted reasonably and in good faith in fulfilling his obligations under this section.

Affording the licensee significant journalistic discretion has been a fundamental part of the Commission's regulatory scheme.[8] This is only as it should be in light of the mandates of the First Amendment and the no-censorship provision (Section 326) of the Communications Act. The need to accord great latitude to the judgment of the broadcaster as to what constitutes reasonable access is underscored by the severity of the ulti-

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[7] 34 FCC 2d 510, 536 (1972).

[8] *CBS v. DNC, supra*, at 110-111.

mate penalty for violation of Section 312(a)(7). In addition, the equal opportunities provision (Section 315) of the Communications Act and the Fairness Doctrine impinge upon the reasonable access provision and make it difficult to implement, especially when there is a multiplicity of candidates for Federal office.

NAB believes that the deference the Commission has given to the licensee's good faith and reasonableness remains an entirely appropriate standard. Indeed, the following facts, all amply documented in the networks' three submissions, highlight the enormous problems which would ensue from upholding the complaint:

—the extraordinary number of candidates, each potentially capable of asserting a colorable "equal opportunities" claim under Section 315;

—the unprecedented earliness of the request;[9]

—the inability of the Commission to specify, as a matter of law, the many factors to be considered by a licensee (or a network) in determining whether, when and how much time to sell to a political candidate;

—the geographical sloppiness of political boundaries (*see*, e.g., CBS Comments at 11 & n. *); broadcast stations' service areas rarely coincide neatly with the candidate's targeted voting population;[10]

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[9] By way of comparison, in the 1976 campaign the earliest political "program time" ABC sold was aired on April 23, 1976 (ABC Comments at 9), and the first political half-hour NBC sold was broadcast on March 31, 1976 (NBC Comments at 2). CBS has already offered the complainants two 5-minute program time slots in early December, 1979 (CBS Comments at 1).

[10] For instance, to secure adequate and effective television exposure in the pivotal state of New Hampshire, a candidate would have to buy time on stations located in Boston, Massachusetts; Portland, Maine; Poland Springs, Maine; Burlington, Vermont; Lebanon, New Hampshire; and perhaps Albany, New York. The

—the special inappropriateness of demands for time on the national networks nine full months before the first relevant national political event (the Democratic Convention, August 11-14, 1980);

—competition in time demands from candidates for state and local offices; which the licensee may properly adjudge of greater immediate concern to his community (*see infra* at III);

—the availability of other media, broadcast and non-broadcast;

—the not inconsequential disruption of regularly scheduled programming, with the threat of having to hastily substitute quickly-produced filler for longstanding, suddenly ousted, series;

—and most importantly, the observation that all three networks—and local stations as well—cover the U.S. Presidency through their news departments continuously, 365 days a year.

This final consideration underlines the cardinal importance of the Commission's allowing broadcasters flexibility in determining when and how much time they will currently sell to Presidential candidates. The issue is not whether the FCC agrees with the decisions of the three networks but whether the Commission can make a finding that the networks can be said to have acted in good faith.

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[10] [footnote continued]

more populous state of New Jersey offers an even more dramatic spillover problem, lacking as it does even a single commercial VHF outlet.

III. *Licensees Should Be Allowed Flexibility in Balancing Requests for Access by Federal Candidates With Other Types of Programming and in Determining When Access Should begin to be Granted.*

The reasonable access provision only applies to Federal races. During any regular election period, of course, numerous candidates for state and local public offices will also want air time. In some cases, local elections may eclipse Federal ones in urgency or interest. As stated by the Commission in *Daniel Walker:* [11]

> It is the duty of each licensee to determine which campaigns and/or elections are of the most importance and interest in its service area and to devote a reasonable amount of coverage to those campaigns and/or elections.

In addition to those requests for time by candidates for Federal, state and local offices, broadcasters serve the public interest by carrying other types of programming. Thus, the Commission has stated:

> [I]mportant as an informed electorate is in our society, *there are other elements in the public interest standard, and the public is entitled to other kinds of programming than political. It was not intended that all or most time be pre-empted for political broadcasts.*[12]

The standard by which a licensee's selection of programming is to be judged was set forth in *Summa Corporation:* [13]

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[11] 57 FCC 2d 799, 800 (1975).

[12] *Use of Broadcast and Cablecast Facilities by Candidates for Public Office,* 34 FCC 2d at 536.

[13] 43 FCC 2d at 602, 604 (1973).

> [W]here a licensee's judgments or policies under the circumstances represent a reasonable, good-faith attempt to accommodate both the right of Federal candidates to fully inform the voters of their candidacies and the interest of the public in programming other than political broadcasts, this Commission will be disposed to affirm such judgments and policies as reasonably fulfilling the obligations of a licensee under Section 312(a)(7).

The basic issue posed by the Carter-Mondale complaint is not whether any particular Federal candidate is entitled to access but when access must be granted. The Commission, in a recent interpretive ruling on when a licensee's obligation to afford reasonable access begins, stated that "a licensee would be unreasonable if it refused to afford access to Federal candidates at least during those [statutory] time periods" when the lowest unit charge provision of Section 315 is applicable (namely, 45 days prior to a primary election and 60 days prior to a general election).[14] As to whether "reasonable access" must be afforded before those periods, the Commission stated that this was a determination which "must be made in each case under all the facts and circumstances present."[15] The Commission also commented that it had "received no Congressional guidance as to when Section 312(a)(7) should be effective prior to a convention or caucus since the 'lowest unit charge' provision applies only before election."[16] Recognizing the "large variation in procedures utilized for obtaining nomination through such methods," the Commission did

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[14] *Report and Order In the Matter of Commission Policy In Enforcing Section 312(a)(7) of the Communications Act*, 68 FCC 2d 43 RR 2d 1029 (1978).

[15] 43 RR 2d at 1045, 68 FCC 2d at 1091.

[16] *Id.*

not suggest any time limits on access in such situations, and simply commented that licensees would be expected "to afford access at a *reasonable time prior to a convention* or caucus." [17] As noted earlier in our Comments, the Democratic National Convention will be held on *August 11-14, 1980*. Surely, the decisions of the networks that they would not begin to sell half-hour political programs to Presidential candidates seeking nomination at the 1980 national political conventions until early 1980 is clearly not unreasonable, especially in view of the nature and length of the Presidential campaign and the multiplicity of candidates who are already participating in that campaign.[18]

IV. *Conclusion.*

The Carter-Mondale complaint, while limited to the networks, involves issues of vital importance to all broadcast stations. As we have shown, the legislative history of Section 312(a)(7) as well as past Commission and court decisions, sensitive to First Amendment principles, clearly indicate that the responsibility of weighing competing requests for access and determining an appropriate allocation of the limited amount of time available properly lies with the licensee. Accordingly, NAB urges the Commission to continue to adhere to its

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[17] *Id.* (emphasis added).

[18] As the essayist and political observer Leonard Silk has observed:

> The entries in the Presidential sweepstakes are off and running. Never before in the memory of political handicappers has the race started so early and so furiously. With the erosion of party discipline and insider control, the contest for the Presidency has taken on the character of a large national advertising campaign.

"Inflation Views of Candidates," *New York Times* (November 7, 1979) at D2.

policy of allowing broadcasters significant flexibility in determining when and how much time they will sell to federal candidates.

Respectfully submitted,

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November 8, 1979

[Certificate of Service Omitted in Printing]

[LETTER FROM CARTER-MONDALE PRESIDENTIAL COMMITTEE, INC.]

CARTER-MONDALE PRESIDENTIAL
COMMITTEE, INC.
1413 K Street, N.W.
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November 9, 1979

Mr. William J. Tricarico
Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: *Complaint of Carter-Mondale Presidential Committee, Inc.*

Dear Mr. Tricarico:

This morning, Counsel for the Committee was served with comments filed by the National Association of Broadcasters supporting the networks' refusal to sell the Committee the one half-hour which it had requested. These comments largely duplicate the arguments made by the three networks to which we have already replied; therefore, neither an extensive response nor a delay in the consideration of the complaint is required.

However, we do wish to make three brief points. First, to the extent First Amendment considerations are involved in this matter, they firmly support the Committee's complaint. The basic thrust of Section 312(a)(7) promotes and furthers the goals of the First Amendment by providing the public with access to the ideas and positions of political candidates, thereby fostering an informed electorate.

Second, the "business as usual" approach of the NAB to the positive duties imposed upon broadcasters by Sec-

tion 312(a)(7) shows the importance of the issues raised by the Committee and the need for a definitive ruling by the FCC at this time. The position that this section is merely a "codification" of existing law, intended to maintain the *status quo*, has specifically been rejected by the Commission. See *Enforcing § 312(a)(7)*, 68 F.C.C. 2d 1079, 1088 (1978).

Third, the NAB's concerns for its membership go far beyond the precise issue which is now before the Commission—the obligations of the three commercial networks to the one set of candidates (Presidential candidates) for which they have statutory access obligations. Indeed, as we have previously pointed out, the networks' present intransigent position makes it more difficult for NAB's individual licensee members to fulfill their obligations.

Very truly yours,

/s/ Timothy G. Smith
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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Complaint of the Carter-Mondale
Presidential Committee, Inc.

COMMENTS OF NATIONAL CITIZENS COMMITTEE FOR BROADCASTING

The National Citizens Committee for Broadcasting (NCCB)[1] by its counsel, the Media Access Project, hereby presents comments for consideration in the above-cited proceeding.

On October 29, 1979, the Carter-Mondale Presidential Committee, Inc. (Committee) filed a complaint against

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[1] The National Citizens Committee for Broadcasting is a Washington, D.C.-based, non-profit public interest group with a national membership of 10,000 individuals and media reform groups. NCCB's members have an interest in receiving contrasting views on issues of public importance, including opposing viewpoints of candidates for public office. NCCB has participated in other proceedings before the Commission, including its recent Request for a Declaratory Ruling that Ronald Reagan for some time has been a legally qualified candidate, for equal opportunities purposes, for the Republican presidential nomination, prior to his formal announcement, now scheduled for tonight (see Attachment A to these Comments); and its Petition for Rulemaking seeking an amendment to the definition of "legally qualified candidate" contained in Section 73.1940(a) of the Commission's Rules. The Commission's Memorandum Opinion and Order denying both matters was released August 15, 1979, and NCCB's appeal to the U.S. Court of Appeals for the District of Columbia Circuit was docketed on November 7, 1979 (No. 79-2112).

the three commercial networks for refusing to provide access, as required by Section 312(a)(7) of the Communications Act. ABC and NBC filed responses on November 5, 1979, and CBS filed a response on November 6, 1979. On November 8, 1979, the National Association of Broadcasters (NAB) filed comments, and the Committee filed its reply to the networks' responses. NCCB's comments address the issues raised in those filings, and are offered in support of the Committee's Complaint.

The Carter Committee, in letters dated October 11, 1979, asked each of the networks to provide one half-hour of prime time during the first week in December, nearly two months later. The Committee intended (Complaint, page 2) to use only one half hour on one network, "after reviewing the availabilities." The Committee expressed its interest in any half hour between 8 p.m. and 10:30 p.m. on either December 4, 5, 6, or 7 (see Attachment A to Complaint). Thus it was willing to accept any one of 60 half-hour segments out of the three networks' total weekly availabilities of 132 half hours. Moreover, as explained in the Complaint, the Committee intentionally avoided requesting time during the national ratings sweep period (Complaint at 3), and sought only one half hour, not a series of broadcast segments ("It does not intend to make such purchases a regular practice," Complaint at 8).

Despite the Committee's two-month notice and its willingness to accept any of nearly half of the half-hour segments the networks broadcast, all three networks turned down the request for access. (Network letters are Attachment B to the Complaint.) CBS, on October 17, 1979, explained its refusal to provide the requested half hour on the basis of the "large number of present and potential candidates for the Republican and Democratic presidential nominations, since "accommodating potential requests for equal treatment from other candidates would involve massive disruptions of the regular entertainment

and information schedule of the CBS Television Network." CBS did agree to make one five-minute segment in prime time available for purchase on December 8 at 10:55 p.m. (this five-minute slot on Sunday evenings is generally a period of low viewership), and one five-minute daytime segment. CBS had earlier made this same offer to certain Republican presidential candidates.[1]

ABC and NBC both responded in letters dated October 23. Both indicated their belief that December is too early to begin a presidential campaign.[2] In ABC's words: "the ABC Television Network has not reached a decision as to when it will start selling political time for the 1980 Presidential Campaign . . ." but probably "a decision will be made to make political time for the Presidential Campaign available on ABC-TV early next year." Similarly, NBC stated: "Based upon our experience with past campaigns, we believe it is too early in the political season for nationwide broadcast time to be made available for paid political purposes."

Faced with these refusals, the Committee filed its Complaint with the FCC two weeks ago.

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[1] At least one of these, Ronald Reagan, had similarly requested a half hour in prime time. Turned down by the networks, he has purchased time on a large number of independent stations for broadcast tonight. See Attachment A hereto.

[2] CBS, which has offered five-minute segments to certain candidates and which broadcast an hour-long program on Senator Kennedy's candidacy during prime time on November 4, 1979 (Reply, at 2, n.*), obviously disagrees. So do the independent stations in the three-fourths of the nation's television markets that will reportedly air the Reagan political broadcast tonight. See Attachment A hereto. Moreover, the Carter filings imply that the other two networks may be somewhat disingenuous in premising their refusals to sell time on the basis of what they term a "premature" request, since ABC carried 51 minutes, 22 seconds on the presidential campaign between September 1, 1979, and October 9, 1979, and NBC carried 70 minutes. Complaint at 4 and Attachment A thereto.

The Committee contends that Congress intended that candidates, not broadcasters, should determine when campaigns begin and when political broadcast time should be purchased (Complaint at 4 and Reply at 8). NCCB agrees. The Federal Election Campaign Act, of which Section 312(a)(7) was a part, was enacted to facilitate the development of an informed electorate by giving "candidates for public office greater access to the media so that they may better explain their stand on the issues and thereby more fully and completely inform the voters." (117 Cong. Rec. 512872 (daily ed., Aug. 2, 1971), cited with approval by the Commission in *In re Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, BC Docket 78-102, July 31, 1978, para. 31.) While candidates are entitled to determine when their campaigns begin,[1] as the Committee has stated, it is the

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[1] Although this determination need not be demonstrated by means of a formal announcement of candidacy, as argued in NCCB's previous filings; noted on page 1; as recognized in the Commission's order thereto (FCC 79-440), which stated:

> some actions are the equivalent of a public announcement [citing *Law of Political Broadcasting and Cablecasting*, 69 FCC 2d 2209, 2229 (1978)] . . . . We are not pursuaded that the Commission would be helpless under the present rule if a candidate should campaign actively, fulfill all the other requirements of candidacy and yet attempt to defeat his rivals' equal opportunities rights by not formally announcing. If such a candidate filed the necessary papers to qualify for a place on the ballot for a state primary, he would be deemed to have publicly announced. By the same taken, if he made a substantial showing that he was a candidate, as set forth in 73.1940 (a)(5), it is quite possible that the Commission would find that his statements or perhaps even his behavior constituted the equivalent of a public announcement. On that basis the Commission might further find him legally qualified under our rules. Moreover, if a person "has engaged to a substantial degree in activities commonly associated with political campaigns [such as] making campaign speeches, distributing campaign literature, issuing press releases, maintaining a campaign committee and establishing campaign headquarters"

viewers' rights to be informed by means of the broadcast media that were the basis for the enactment of Section 312(a)(7) and that are primarily violated by the networks' refusal: "More importantly, it denies the public the opportunity of hearing and seeing the candidates in the manner which they have chosen to appear." Complaint at 2.

The arrogance of the networks (and their representative, the NAB) that is so apparent in their letters to the Committee and their filings to the Commission is precisely why Congress had to enact Section 312(a)(7) and why the choice about when to air political broadcasting very properly has not been left to the broadcasters. As the Commission has stated, "Federal candidates are the intended beneficiary of Section 312(a)(7) and therefore a candidate's desires as to the method of conducting his or her media campaign should be considered by licensees in granting reasonable access." *Commission Policy in Enforcing Section 312(a)(7)*, *supra*, at n. 14 to para. 39. It should be obvious that if the networks so brazenly refuse to provide paid access upon request by the nation's president, it is all the more unlikely that the networks will agree to provide access to major party challengers or third-party candidates. And it is the rights of these candidates and the public's rights to hear their views that Section 315 was long ago enacted to protect.

> it is difficult to envision that during these activities he would not indicate that he is a candidate (Order, paras. 12-13);

and as acknowledged by the Committee:

> Since none of the three networks are contending or basing their refusal on a claim that President Carter is not a "legally qualified candidate" at this particular time—it is not an issue here. Nevertheless, the Commission should be aware that the Committee can establish that President Carter satisfies the requirements of the Commission's rules as set forth in section 73.1940 [even though no] formal announcement has been made." (Complaint at 3-4.)

Singer, *The FCC and Equal Time*, 27 Md. L.Rev. 221 (1967).

The 1980 election promises to be one of the most vigorously contested in recent years. There can be no doubt that appearances by candidates that are broadcast on the media are likely to have a profound impact on which persons succeed in getting their parties' nominations and ultimately in winning the election.[1] The presidency is a uniquely national office: the media coverage given a delegate contest in one state unquestionably affects the outcome in other states and ultimately shapes the electorate's views. With no clear indication at this time of who will obtain either party's nomination, this is one of those years that conforms to the Commission's observation that "a presidential campaign may be in full swing almost a year before an election." *Commission Policy in Enforcing Section 312(a)(7)*, *supra*, para. 45. The Commission should find that the current presidential campaign is in full swing and the networks' willful refusal to provide a half hour of prime time[2] to the Committee violates Section 312(a)(7).

NCCB further requests that the Commission clarify two points of law on which there appears to be some confusion. First, although the networks may feel they have a responsibility to provide time to all legally quali-

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[1] For example, President Carter and Senator Kennedy have agreed to debate in a televised presentation on January 7, 1980, a debate expected to be broadcast nationally by one or more of the networks. Reply at 2, n.* and Attachment B hereto.

[2] The Commission's *Policy in Enforcing Section 312(a)(7)* concluded that: "Licensees must provide prime-time program time absent unusual circumstances" and "Licensees may not have a policy of flatly banning Federal candidates from access to the types, lengths and classes of times which they sell to commercial advertisers." Para. 55(b) and (c).

fied candidates once they provide time to Carter,[1] and although NCCB supports wide accessibility of the media to candidates, in fact the law is clear that a network's act of providing a half hour to Carter only obligates that network to provide equal opportunities to the two other legally qualified candidates for the Democratic presidential nomination, Senator Kennedy and Governor Brown.[2]

Second, there may also be some confusion as to whether President Carter will be a legally qualified candidate after he announces his intention to seek re-election, if he is not already a legally qualified candidate under Section 73.1940(a) of the Commission's Rules. That Section appears to set three prerequisites that must all be met before equal opportunities apply:[3] public announcement, qualifying for the office, and qualifying for a place on a ballot or otherwise demonstrating the seriousness of a candidacy. Yet in its Order denying petitioner's Petition for Rulemaking to amend Section 73.1940(a), the Commission stated that contrary to the explicit language of the Section, the three prerequisites in fact are not all essential elements in every case.[4] Since NCCB does not believe President Carter has yet qualified for election in the 10 states that Section 73.1940(a) expressly requires before a candidate may be considered

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[1] *See, e.g.*, NBC Response at 2, ABC Response at 5, CBS Response at 9, and NAB Comments at 7. A related point of confusion appears in the Committee's Reply at 4-5, which suggests that if one network were to provide the requested half hour, the other two could help satisfy the equal opportunities invoked thereby.

[2] *Law of Political Broadcasting and Cablecasting, supra,* 69 FCC 2d 2209, 2218.

[3] There is no reason to think that the definition of "legally qualified candidate" for Section 312(a)(7) purposes is in any way different. No rules have been promulgated under that Section.

[4] Order at paras. 12-13, quoted above.

a legally qualified candidate in all states (and therefore, before a network providing access may be required to provide equal opportunities to other legally qualified candidates), the network broadcast, if provided, may not lead to Section 315 obligations. This result has not been suggested in any of the previous filings in this matter, and may not be what the Commission intends the effect of its Rules to be. Therefore, NCCB once again respectfully asks the Commission to clarify whether a presidential candidate now or by December 4, 1979, is likely to be a legally qualified candidate for equal opportunities and reasonable access purposes.

Respectfully submitted,

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November 13, 1979

ATTACHMENT A

THE WASHINGTON POST *Sunday, November 11, 1979*

REAGAN DUE TO REWRITE LOW-KEY SCRIPT TUESDAY

BY LOU CANNON
Washington Post Staff Writer

When a West Coast reporter complained recently to Ronald Reagan's campaign manager, John P. Sears III, that Reagan had not said anything new in months, Sears smiled and shot back, "I certainly hope he hasn't."

And when the 68-year-old Reagan was asked a few nights later what he would do to disabuse voters of the notion that he is too old to be president, Reagan quipped, "Skip rope through the neighborhood."

These statements epitomize the take-it-easy, say-nothing strategy Reagan has followed with few deviations since he formed his fund-raising "exploratory committee" eight months ago. Enjoying his favored status as Republican presidential frontrunner, Reagan has been content to stay on the sidelines through most of 1979.

Now, however, the script is about to change.

Tuesday night, before a Republican fund-raising dinner at the New York Hilton Hotel, the former California governor officially will unfurl his candidacy and then embark on a five-day, nine-state tour in which he has promised to discuss issues and answer what Sears expects will be "sharp and challenging" questions by the press.

Because Reagan has said so little for so long, and because the new speech will be televised to much of the nation Tuesday night, his managers see the Reagan launching as a pivotal event.

With the spotlight on him, a man who would turn 70 within a month of his inauguration as president will seek to demonstrate that he is an appropriate candidate for the 1980s. He must also, in Sears' words, "get people to look up a little bit" while showing that he has the vitality, ideas and capacity to serve as president of the United States.

"When the central question is leadership," says Sears, "the candidate must be perceived as someone who can solve the problems."

This means, in Sears' view, a speech that shows Reagan is neither too old nor too old hat. It would be a difficult maneuver because Reagan also is trying to remind the faithful supporters who have been with him since his "island of freedom" speech for Barry Goldwater in 1964 that he is not abandoning principles to capture an ill-defined center.

"There wouldn't be any point in even considering this race if I were willing to change what I believe in order to garner a vote here and there," Reagan said recently.

Nonetheless, the Tuesday speech is designed to present another Reagan, if not a new one, a Reagan who is supposed to offer both fresh ideas and new leadership.

Sears believes that the Democratic Party, "the major poiltical institution that's been running the country for the past 50 years has run out of ideas." If the GOP can capitalize on this, he adds, it will start winning elections it has been losing.

Reagan may find it easier to solve the ideological equation than to answer questions about age or fitness. As an eight-year governor of the nation's most populous and diverse state, he compiled a record more moderate than his national rhetoric suggests.

A survey taken when Reagan left office found him highly popular with moderate Republicans and with many Democrats.

Sears further suggests that many of Reagan's positions on both economic and national defense issues are more popular now than they were when Reagan first took them.

Whenever Reagan is trying to convince the voters of anything, he turns to television—and this will be his principal reliance this week.

On Monday afternoon he will [illegible] the same half-hour speech he will give to the GOP fund-raiser the following night. It will be seen Tuesday night in three-fourths of the nation's television markets at a production and distribution cost of more than $400,000. The Reagan campaign put together its independent network after the major networks refused to sell the time.

Sears, who played an important management role in Richard M. Nixon's successful 1968 presidential campaign and almost pulled off a Reagan upset of President Ford in the 1976 primaries, is not leaving the perceptions of Reagan to chance.

As Reagan tours the Northeast and Midwest next week, Sears will unveil endorsements from moderate GOP leaders designed to convince skeptics that a Republican bandwagon is forming behind Reagan.

"We should take advantage of being a frontrunner," Sears said in an interview Friday. "Others don't have that luxury."

Sears' comments are studded with references to other frontrunners who tried to sit on their supposed leads—notably Republican George Romney in 1968 and Democrat Edmund S. Muskie in 1972—and he does not intend to have Reagan repeat their mistakes.

"You have the problem, especially if you're the front-runner, of maintaining the discipline to say precisely what you mean," Sears said. "You can't let down. If you're off by one hair, it will cause problems. I'm not worried that Reagan will make a fatal error but even if you make a small error, the time spent going back on it will be a hinderance."

Reagan has made his share of mistakes in two previous campaigns for the presidency and two races for governor of California. But he is, on the whole, a polished campaigner who holds his own in interviews, especially on television.

While some have suggested the Sears strategy for 1980 resembles Nixon's campaign of 1968, Sears insists that is not fair.

To say that Nixon in 1968 was controlled is mild," says Sears. "He didn't make any news and he declared moratoria on a number of issues. We're not in that position. We expect to make news.

"It wouldn't be good to try to hide," he added.

Reagan's schedule next week is demanding. After his Tuesday night speech in New York, he flies to Washington around midnight. He plans a press conference at 10 a.m. the next day in the Senate's Dirksen Office Building.

Then he plans to depart for rallies in Boston and Manchester, N.H., returning to New York the same night. Before the week is out and he returns to his home base in Los Angeles, Reagan will have visited Philadelphia, Chicago, Milwaukee, Grand Rapids, Mich., Atlanta and the Florida GOP presidential preference convention in Orlando.

In his California campaign, Reagan was known as a candidate who could endure a grueling schedule for a short time, as long as it was followed by a period of

rest. Those who know Reagan say this may be a by-product of his work schedules in the movie business and its common pattern of intense periods of hard work followed by long spells of inactivity.

After his first week of campaigning, Reagan is scheduled to take a week off and then hit the trail again for five days in a cross-continent schedule that includes stops in Alaska, Minnesota, Arkansas and Alabama. He plans light campaigning in December, including a probable stop in Iowa, and then heavier, more constant campaining after the first of the year.

Washington Post staff writer Dan Balz and researcher Katherine Macdonald contributed to this story.

ATTACHMENT B

THE WASHINGTON POST

WEDNESDAY, NOVEMBER 7, 1979

January Faceoff Will Come Before Caucus Voting

KENNEDY, CARTER AGREE TO IOWA DEBATE

BY EDWARD WALSH
Washington Post Staff Writer

President Carter and Sen. Edward M. Kennedy (D-Mass.) agreed yesterday to a debate in Des Moines in early January, two weeks before Iowans meet in precinct caucuses to begin the process of selecting their party's presidential nominee.

Carter was the first to accept an invitation from the Des Moines Register and Tribune for an appearance with Kennedy. A short time later, the Massachusetts senator, who formally will declare his presidential candidacy today, accepted the challenge.

Kennedy, en route to Boston for his announcement, said, "I think it's appropriate to have the debate. I've always debated in the past. I think anybody who seeks the presidency should debate, and I'll look forward to that opportunity."

James Gannon, executive editor of the Register and Tribune, said the debate is being planned for a night during the week of Jan. 7 in the 2,500-seat Des Moines Civic Center. While the details have not been settled, he said that questions would be posed to the candidates by a panel of four reporters, two from the Register and Tribune and two national correspondents, followed by questions from the audience.

Gannon predicted that the national television networks will find the first face-to-face confrontation between the

president and his leading challenger irresistible, turning the Iowa event into a national political spectacle.

The third Democratic presidential contender, California Gov. Edmund G. (Jerry) Brown Jr., was not invited to the debate because he "has not mounted any campaign here that is discernible," Gannon said.

The Register and Tribune, Iowa's dominant and most influential daily newspapers, also have invited seven Republican presidential hopefuls to appear in a similar debate format the afternoon of Jan. 5. Gannon said tentative acceptances have been received from several of the Republicans and predicted that there will be a GOP debate involving at least some of the candidates.

Iowa Democrats and Republicans will meet in precinct caucuses Jan. 21 to select delegates to later district conventions and the state conventions that eventually will send Iowa delegates to the national party nominating conventions next summer.

The debate could raise the importance of the Iowa political battlefield far beyond the 30 Democratic convention delegates to be chosen in the state. It is certain to attract intense media coverage and have an impact on later states where Kennedy and the president will meet in primaries.

White House and Carter campaign officials have been considering challenging Kennedy to a debate for some time. They clearly preferred not to issue the challenge themselves, but to find a neutral sponsoring party, such as the Register and Tribune.

The event clearly fits the president's needs, his advisers believe. While Kennedy is considered a better stump speaker, Carter's aides believe the president's strength is in the question-and-answer format, which he has used successfully in his town meetings around the nation.

Carter won a Democratic straw poll in Iowa last Saturday with 70 percent of the vote and is considered to be far ahead of Kennedy in organizational strength there. But public opinion polls earlier in the fall showed Kennedy leading Carter by a substantial margin in Iowa.

In other political developments yesterday, White House press secretary Jody Powell confirmed that Robert S. Strauss, the administration's special ambassador for the Middle East peace negotiations, is resigning to become * * * [Illegible] * * *

Powell also confirmed that Strauss will be replaced in the diplomatic post by Sol M. Linowitz, who helped negotiate the Panama Canal treaties.

Meanwhile, Carter campaign officials announced that S. Lee Kling, a longtime aide to Strauss, would become the campaign committee's national treasurer. John Dalton, who has held that position, will return to a position in the Commerce Department, they said.

The Kennedy campaign announced yesterday that former senator Dick Clark, who resigned last week as the Carter administration's special ambassador for refugee programs, would be the national director for political organizations of the Kennedy organization.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

November 20, 1979

OPEN COMMISSION MEETING[*]

In the Matter of:

Title: Complaint of the Carter-Mondale Committee
Against the ABC, CBS, and NBC
Television Networks.

Summary: The Commission has before it a complaint of the Carter-Mondale Committee against the ABC, CBS, and NBC Television Networks concerning the networks' refusal to sell a half-hour time segment. The Committee alleges that the networks' refusal to sell the time constitutes a violation of the "reasonable access" provision of Section 312(a)(7). All of the networks claim that their decisions are reasonable and that the complaint should be denied. The Commission must decide whether the networks have fulfilled their obligations under Section 312(a)(7).

The above-entitled matter came on for subject pursuant to notice, before Chairman Charles D. Ferris presiding, at 1919 M Street, N.W., Room 856, Washington, D.C. at 2:00 p.m.

[* This transcript was included in the Appendix filed in this case in the court of appeals. Counsel for Respondents Federal Communications Commission and United States of America have consented to its inclusion in this Joint Appendix, without prejudice to the Commission's general position, which it has taken in other cases, that the comments of Commissioners at open Commission meetings are not a part of the administrative record.]

APPEARANCES:

Commissioner Tyrone Brown
Commissioner Abbott M. Washburn
Commissioner Robert E. Lee
Commissioner James H. Quello
Commissioner Joseph Fogarty
Commissioner Anne P. Jones

Also Present:

Lisa Margolis
Dick Shiben
Robert Bruce

PROCEEDINGS

(2:04 p.m.)

CHAIRMAN FERRIS: The meeting will come to order. The housekeeping announcements from the standpoint of schedule, general item number one has been passed at the request of Commissioner Washburn to December 4th. Private Radio number five has been passed by the General Counsel to December 19th. Oral number one was withdrawn at the request of the Broadcast Bureau. Television one and two are withdrawn by request of the Broadcast Bureau.

Broadcast Three was passed by Commissioner Washburn to November 29th, and the closed general one was passed by the Executive Director to December 4th. Today's meeting will begin with Complaints and Compliance Number Four, the Carter-Mondale Presidential Committee Complaint. Otherwise, after the disposition of that item, we will follow the agenda previously released. So, Dick, the first item is the complaint of the Carter-Mondale Committee against ABC, CBS, and the NBC networks.

MR. SHIBEN: Lisa Margolis has been handling this for the Bureau, and she will present the item for us.

CHAIRMAN FERRIS: Ms. Margolis?

MS. MARGOLIS: The Commission has before it a complaint filed by the Carter-Mondale Presidential Committee, Inc., against the ABC, CBS, and NBC Television Networks. The complaint allges that all three networks violated the "reasonable access" provision by refusing to sell the Committee a half hour of program time during the first week in December.

The complaint further alleges that the time is to be used by the President in his capacity as a candidate for the Democratic nomination for President. The Committee asserts that it can establish that the President is a—will be a legally qualified candidate at the time of the broadcast, and that in any event, whether he is a legally qualified candidate is not in issue because none of the networks have raised claim to the contrary.

The Committee contends that all of the networks—that the reasons given by the networks for refusing to sell the time are totally insufficient. NBC has not made any commitment to sell any time. ABC has stated that it will beging to sell time in the first week of January, 1980, and CBS has offered to sell two five-minute segments to the Committee.

Responses were requested of the networks. All of the networks assert that they have not abused their discretion and that the complaint should be denied. They argue that their decisions are reasonable since the sale of the time—since sales to Presidential candidates at this time would be premature. They further assert that their decisions are reasonable in light of the fact that a multiplicity-of-candidates problem exists at the present time.

They also claim that the sale of the requested time would result in substantial programming disruption. The "reasonable access" provision essentially requires broadcaster to provide reasonable access to Federal candidates.

The Commission, in July 1978, issued a report and order on its policy in enforcing Section 312(a)(7). There it stated that it would continue to rely on the good faith judgements of licensees in determining whether reasonable—whether—in reviewing "reasonable access cases." It further stated that it would look to three factors in determining whether reasonable access had been afforded:

It stated that it would look to—those factors were, first, the needs of candidate; second, whether a multiplicity of candidates problem existed; and, third, the availability of particular periods of time.

The Commission stressed the importance that broadcasters must give to the needs of the candidate in making "reasonable access" determination. It stated that the needs of the candidate must be honored to the fullest extent—rather, it stated that the desires of the candidate in pursuing his media campaign should be honored as much as possible within the reasonable limits imposed by the licensee.

Initially in this case, there are two procedural questions that must be considered: The first involves jurisdiction; that is, whether section 312(a)(7) applies to networks. NBC contends that it does not. NBC based its claim on the fact that the section refers to the use of a broadcasting station and that it contains in a section of Communications Act relating to license revocation.

The Bureau recommends that the Commission find that Section 312(a)(7) does apply to networks, because networks are the only practical method of securing national access. A ruling that Section 312(a)(7) does not apply to networks would make it considerably difficult for Presidential candidate to obtain access.

The Bureau does not believe that Congress intended such a result, and we therefore recommend that the Commission rule that Section 312(a)(7) does appy to networks.

The second procedural question in this case involves the question of whether President Carter is a legally qualified candidate within the meaning of our rules. In other context, the Commission has ruled that it will consider whether a candidate has qualified within the meaning of our rules, despite the absence of a claim to the contrary by the licensee.

In order to qualify nationwide, a candidate—under our rules, a candidate must show that he has qualified in ten states, and he must show that he has satisfied all three requirements of the definition of a legally qualified candidate.

In this case, the Committee has not provided any specific information to show that President Carter has qualified for a place on the ballot or made a substantial showing of bonified candidacy. However, we recognize that the Committee has stated that it can establish that President Carter is a legally qualified candidate—rather will be a legally qualified candidate at the time of the broadcast.

In light of this allegation, the Bureau recommends that the Commission proceed to consider the merits of this case. In the event that the President is not a legally qualified candidate at the time of the broadcast, the networks need not honor his request at that time.

Proceeding to the merits of the matter, the Commission —the merits, of course, involve the "reasonable access" provision which I have previously discussed. This is, in fact, a case of first impression: Although the Commission has been presented with numerous cases involving House and Senate races, it has never been presented of when reasonable access should begin Presidential races.

Accordingly, the Commission has three options available to it in this case: First, it could find that all three networks were reasonable in denying the request in light of the fact that campaigns are now being waged on a state-by-state basis and the national campaign has not yet begun.

The second option is to find that NBc and ABC were unreasonable in denying the request in light of the fact that they have not given sufficient consideration to candidate needs, while finding that CBC was reasonable in offering two five-minute segments in light of the fact that there is a multiplicity-of-candidates problem in this case.

The third option available to the Commission is to find that all three networks were unreasonable in denying the request in light of the fact that none of them have given sufficient consideration to the candidate's needs in this case.

The Bureau recommends that the Commission follow the third option and find that all three networks were unreasonable in denying the request in light of the fact that they have not given sufficient consideration to the candidate's needs.

Thus, we recommend that the Commission find that the networks were unreasonable in view of the fact that they have not given adequate explanation to support their decision. This recommendation is based on two reasons: First, the Bureau believes that the campaigns now are not being waged on an isolated, local basis; rather, we believe that the campaign is now being waged on a nationwide basis and that it is in full swing.

Second, we believe that none of the networks have given sufficient consideration to the candidates' desires in reaching their decision. Accordingly, we recommend the Commission find that all three networks were unreasonable in denying the request, and we further recommend that the Commission require the networks to advise it how they plan to comply with their "reasonable access" obligations by November 26th, 1979.

CHAIRMAN FERRIS: The option that the Bureau is recommending then, Ms. Margolis, is that all three networks are unresonable because they made a blanket determination without listening to the individual char-

acterizations of the campaign or the needs of any of the candidates, and the applicant in this case, and made a blanket determination that no time would be made available on their network until some time when they had selected in the future.

MS. MARGOLIS: Well, that is the gist of it. However, we do recognize that CBS has offered to make two five-minute segments available to President ——

CHAIRMAN FERRIS: Did it not make a determination that nothing more than a five-minute segment would be reasonable at this time?

MS. MARGOLIS: Excuse me, could you repeat that?

CHAIRMAN FERRIS: Did CBS not make a determination that anything other than five minutes would not be offered at this time?

MS. MARGOLIS: Yes.

CHAIRMAN FERRIS: Without listening to the——

MS. MARGOLIS: Yes, they did. They did not give sufficient —— yes.

CHAIRMAN FERRIS: —characteristics of the candidate from the standpoint of what message they had to convey and the need for that candidate in conducting the campaign?

MS. MARGOLIS: Exactly. In fact, the Committee stated that the purpose of the program was to kick off the entire campaign, and they had wanted to give a detailed and thoughtful picture of the Administration's record, and they felt that that could not be done in the five minutes.

CHAIRMAN FERRIS: And the networks didn't even listen to the specifics of that request. They just made a determination that that would not even be considered on the merits that they had a rule to the contrary.

MS. MARGOLIS: Exactly.

CHAIRMAN FERRIS: And that is what you are recommending is unreasonable, the fact that there was no consideration by the networks for the specific needs

of the candidate, and the policy of the Commission, previously determined, is that there are needs other than the network or the broadcaster's needs; there are needs for candidates in conducting their campaign and determining the strategy of their campaign. There is also the need of the public in being informed about probably the most significant issues that are going to come before on the networks over this next year.

So those three have to be balanced, and there can be no prejudgement from the standpoint of making time available from the standpoint of arbitrary rules with respect to the length of time or the timing. They have to—the networks and the broadcasters have to listen to the specifics of each request. Is that implicit?

MS. MARGOLIS: Exactly, yes. We also believe that the reasons that the networks did in fact give for their decisions were deficient. They had cited—in essence, all of them cited the same three reasons for their decisions. Those were timing, multiplicity of the candidates, and programming disruptions. As to timing, basically they argued that campaigns now are being waged on a local, state-by-state basis, and that the nationwide campaign is not yet in full swing.

We recognize that many announcements have been made and the coverage that has been given to the campaigns by print media, and it seems to us that campaign is indeed in full swing.

We also recognize that the primaries, in effect, determine the outcome of the conventions, in view of the fact that the delegates are bound to vote for the prevailing candidates. For that reason, we feel that the timing—that a conclusion that it is too early to begin selling time is unreasonable.

As to the multiplicity of candidates argument, we believe that networks are in the weakest position to make this argument, since they have only one group of candidates to serve, that is, Presidential candidates.

Furthermore, we believe that although the networks assert that 122 candidates have filed with the FCC, we believe it is highly unlikely that all of these candidates would be able to afford network time, and, therefore, we believe that the multiplicity of the candidates problem itself would not warrant a refusal of the requested time.

Finally, the programming disruptions argument we also felt—the Commission has only discussed programming disruptions in another context: That involved the closing—there, the Commission was discussing the closing days of the campaign, requests made on the closing days of a campaign. Here the request was made far in advance of the closing days of the campaing, and it was also made several months—I believe at least a month before the air date. For that reason we believe that the networks were unreasonable in concluding that the likelihood of substantial programming disruptions was so significant that it would warrant their refusing to sell the time.

COMMISSIONER QUELLO: ABC agreed to sell time after January 1.

MS. MARGOLIS: January 1.

COMMISSIONER QUELLO: January 1st.

MS. MARGOLIS: Beginning with the first week in January, 1980.

COMMISSIONER QUELLO: What kind of a time would require, assuming we said they should sell time. Are we going to give the networks 30 days to comply with this? Is there any timeframe?

MR. MORENO: November 26th is what we propose they file an answer.

COMMISSIONER QUELLO: November 26th.

MR. MORENO: How they intend to comply is what we have written here.

COMMISSIONER QUELLO: I will get my position over real early, and that is, as you know, I think Sec-

tion 312(a)(70, I question its Constitutionality. I think it offends the First Amendment. However, it is there, and I think it is our job to enforce it. There are 26 primaries now instead of 17 that we had before, and I hate to say the networks are unreasonable; I think maybe they had good reasons for opposing it, but in this case with the primaries increasing in number and with the difference between one network, what we are talking about is almost just 30 days difference. I disagree with the conclusions of the networks, and I think we ought to go ahead with the time.

It is an unusual situation, and, Mr. Chairman, I think we have to face the fact that we might be faced with a public outcry if all of a sudden we have 11 or 12 candidates all wanting the same time, but I guess that is a risk we have to take as long as Section 312(a)(7) requires reasonable access, and "reasonable" has never been defined. It is a very close call for me, but I think I will go along with it.

CHAIRMAN FERRIS: I think the question of the public outcry, I think that is exactly what the various candidates would take into consideration when they request the time. If they felt—I am sure no candidate would want to go on the air to lose ground. I am sure that that is why the candidates' considerations, you know, have to play at least a role equal to the economic interests of the networks, because this provision, 312(a)(7), says that the candidates in this timeframe are going to have to pay comparable rates. So what they are going to pay—you are going to have to sit down and negotiate the pay for this time. So from the standpoint, you know, of what the networks are losing, the standpoint of the economic interest, I would be very interested to see what that is.

COMMISSIONER QUELLO: I am not worried about economic interest on this. The fact is, if I were an adviser to a candidate, I would be very careful to as-

sess how much alienation he is going to suffer if there are too many requests with programs—interrupting programs that are very popular and viewed by millions of people.

Network income is not, certainly, any of our concern, I don't think.

CHAIRMAN FERRIS: Well, that is why I think we are here and not running campaigns, too. I think that is why we should let campaign managers run the campaigns, and we should give some deference to those judgments that are made by those who are responsible for the conduct of campaigns. The fact that in this case here, the networks, you know, had blanket rules which really stonewall these requests by not only the Carter-Mondale campaign, but other candidates in the Republican Party, demonstrate that they just had a meat-axe approach that their wishes were going to determine. They were going to determine when campaigns would start, when the public should start focusing on the most important issues to be decided in the next year, and they were going to arbitrarily pick dates.

I think that is really the issue here, and I think that is the recommendation of the Bureau that all three networks were unreasonable in their posture towards this specific request.

COMMISSIONER QUELLO: My characterization isn't nearly as harsh as yours, but I am coming out in the same way you are. I agree.

CHAIRMAN FERRIS: I am not expressing my true feelings in the fervor that I think I could.

COMMISSIONER QUELLO: Okay. Neither am I.

(Laughter)

CHAIRMAN FERRIS: I understand.

COMMISSIONER LEE: I agree that this is a close case. I guess it becomes a matter of judgment as to

whether or not you think the networks were reasonable. I think that they were reasonable, and I don't think we should run political campaigns. I don't think we should run networks either.

I think that one of the important questions to me is how a possible candidate can qualify for access before he is a candidate. It is novel, I am sure, but at the time of this decision, the Carter-Mondale ticket is not a candidate.

MR. MORENO: The other alternative, Commissioner, would be to wait a few days for him to qualify, and then we would have to rush into the same opinion anyway, assuming the same facts were there, and we might as well be criticized from the other side as saying, "Well, why did we act at that time," also. There is that other side of the argument.

COMMISSIONER LEE: Well, you are anticipating facts.

MR. MORENO: Well, we have given them the out, if they don't manage to make it anyway. We say "Well, then you are out altogether. You have got to qualify."

CHAIRMAN FERRIS: The question is, there wasn't a presentment of evidence to demonstrate political activity in ten states to demonstrate a bonified qualification. I am not saying the evidence wasn't available. It was never really put—joined in issue directly, and unless it is joined in issue directly by one of the networks, there will be no necessity for that. It hasn't been, but it is not the fact that the case couldn't be made now; it is the fact that there was no specific joining of issue on a demand presentment of that type of evidence.

COMMISSIONER BROWN: Is the requirement of qualification in ten states separate and apart from the qualification of a substantial showing of candidacy?

MR. MORENO: No, sir. It is an either/or situation: The candidate can either qualify for the ballot in ten states or make substantial showing in ten states.

COMMISSIONER BROWN: And is there—I can't believe that there is anybody in this room who would doubt that as of that date, if not as of this date, that there has been a substantial showing of candidacy on the part of the Carter-Mondale ticket.

MR. MORENO: That is what they maintain, that there will be that showing.

COMMISSIONER JONES: I don't find that I have to get to that issue, really. I am in almost the same posture, perhaps, as Commissioner Lee, but I would phrase it slightly differently, and maybe it is a real difference: I would say—I would not necessarily say that the networks have been reasonable, but I would say that I can not find that they have been unreasonable, and since I think that we sit sort of a reviewing court, my posture is that unless I could say that they are unreasonable, I don't want to second guess the judgement. So I would vote against the item.

COMMISSIONER FOGARTY: Mr. Chairman?

CHAIRMAN FERRIS: Commissioner Fogarty? Oh, go ahead.

COMMISSIONER WASHBURN: Just following up on that, what we are talking about here really is a one-month delay in the selling of political campaign time. The Committee has asked for prime time period, early December, and ABC has offered that time in early January. So it is really a question of whether the FCC should require the networks to accede to the December timing under that section 312(a)(7) the "reasonable access" statute. It comes down to what is reasonable, and it is a close call. I agree with Commissioner Lee. But in my judgement, the January offer is not unreasonable. I believe if you polled the American public today they would say that this was, quotes, "reasonable access."

They would say that eight months of political advertising during the pre-convention period is plenty, and the Democratic Convention is August 10th, realizing that during the post-convention time they are going to get another heavy dose of political advertising.

From January through the election in November is a long, political season. It is longer than almost any other country. In most households, the month of December is given over in large part to the holidays. If the networks are required to sell political advertising to one Presidential candidate in December, they have to do so for all Presidential candidates, regardless of party. So while they might not all be able to buy the time, you could end up with a plethora of these paid, political, Presidential times going on the air in December.

So I think it is reasonable to start this off in January rather than a month early, and since the President is the Incumbent and can command more free time than any other candidate, he is less disadvantaged by the one-month delay than any of the other candidates.

Also, there is the question of the precedent. This has never come before us before in this form, and if we establish a precedent here that the candidate's own determination of his needs are overriding, then every candidate could command time at whatever moment he announces his intention to run. John Connelly announced in January of 1979. George Bush and Robert Dole announced in May of this year, John Anderson in June. I think any of them could make a good case that the campaign was in full swing in the summer.

So this is something that we may be doing here that will affect the future, and, as has been said here before, there is the First Amendment problem, and this is probably the most troublesome thing of all to me, the legal problem involved in our requiring the networks to sell the time in December, the question of FCC's interfering with the discretion of the broadcasters and substitut-

ing our judgement for theirs. I think we should stay away from doing this unless the question of unreasonableness is absolutely clearcut, and as Commissioner Jones says, it is far from clearcut that they have been unreasonable in offering this time.

So I do not find that the one-month's delay is unreasonable, and, therefore I am unable to support the item.

COMMISSIONER QUELLO: I don't find the one-month delay unreasonable, but there is this matter, and that is, legally qualified candidates are entitled, under the statute, to reasonable access, and President Carter made it clear that he would have his formal announcement or he would be a legally qualified candidate before the broadcast. So we have to consider that, too.

MR. BRUCE: Mr. Chairman, our office has worked very closely with the Broadcast Bureau in reviewing the order, and I think we basically concur in the result. I would just like to clarify what I think the decision holds, because I don't think we are finding that in the balancing process between licensee discretion and candidates' needs that candidates' needs are necessarily predominate. What we found here—what we did was—what this order does is approach each of the network's response, and we have looked at the reasonableness of the response.

What we found is that each of those responses ignores one of the relevant factors that we delineated in July of 1978: In 1978 we said there are three or four factors to be weighed, one of which was the candidates' own views as to how he could conduct his media campaign, and not one of the responses addresses that concern.

So, in a sense, our ruling is a very narrow one. It doesn't necessarily portend a rebalancing of those factors. What it finds is on the facts before us that the networks, in effect, fail to address one of the relevant factors, and we do sit, not—I think this order is very carefully drawn to avoid the Commission being in a position of second guessing a judgement made by a licensee.

I think we are looking at it from the standpoint of whether a relevant factor was ignored, and I think we are also looking in terms of the network that did offer some time, whether or not the response of time—whether the offer of a five-minute time in the context of the particular request that was made was responsive, and I think the order finds that there wasn't any attempt by the networks to address the particular reasons that the candidate gave to provide the time.

So I don't think that this order involes a rebalancing of factors. It certainly brings into focus the failure of the networks in this case to give any weight at all in their responses in this particular case to the candidates' needs.

So I would modify, I think, Commissioner Washburn's characterization of the holding case in that regard. I think we come down to the same result which is the decision of the three networks were, in our view, unreasonable.

COMMISSIONER LEE: I would like to—

COMMISSIONER BROWN: Go ahead, Commissioner.

COMMISSIONER LEE: I just would like your response to whether or not Section 312(a)(7) which requires reasonable access applies to networks. I know what you will say, but the provision speaks of sanctions and the network—and speaks of licenses and permits. The networks, as networks, do not hold licenses or—how do you reach that?

MR. BRUCE: I think that the path to jurisdiction is not uncluttered, but I think it is fairly clear, at least I think we can find our way to that.

COMMISSIONER LEE: That is kind of a contradiction in terms.

MR. BRUCE: Yes.

COMMISSIONER LEE: I accept it only because you are a prominent lawyer.

MR. BRUCE: Well, I appreciate your deference, but I think what we have is a history of interpretation under the lowest unit charge has been applied to the networks even though the statute refers to broadcasting stations. The 315 itself does not refer to networks; it refers to broadcast stations, but the Commission over the years has construed the provision as applicable to the networks.

And I think there are a series of decisions involving the chain broadcasting rules that were reviewed in the Second Circuit in the Mansfield case in which Second Circuit accepted a fairly long-standing interpretation of the Commission that the networks fell within the definition of radio broadcasting.

So I also think that you have to read Section 312 (a) (7) as really having two elements to is, one of which adopts the revocation provision; the other adopts an obligation to provide reasonable access, and the phrase that imposes the reasonable access obligation is not limited by its terms to local broadcast stations.

COMMISSION LEE: I don't know as I can completely accept that, and I guess the only way I can get the response I would like: Suppose the network offered time on their five O & O stations? Could we then proceed against the network because they didn't offer time on the network?

MR. BRUCE: Well, I think the theory of this order is that that is not a responsive action by the networks, and that the obligation that is imposed on them is to make an offering of this program to their affiliates. This order does not require the affiliates, necessarily, to clear the program. That is a judgement that they have to make in their local communities. But the order is addressed to the network because our position is that we do have direct jurisdiction over them under Section 312 (a) (7) and they would have the obligation of at least make the offering to their affiliates.

COMMISSIONER LEE: I don't think the networks would accept that. I know that historically we have asked the networks to do many things, and they have always complied because they know there is a way around it through the O & O's, and that is one reason why some of us thought perhaps we should regulate the networks directly as far as we already do indirectly through the O & O's.

MR. SHIBEN: Commissioner, we have pointed out that we recognize that networks traditionally have sold time as a unit on behalf of their licensees to Presidential candidates, and it follows just flowing from that, in view of the fact they hold themselves out as a network unit, that they really can't be heard to complain that 312 (a) (7) does not apply to them.

COMMISSIONER FOGARTY: Mr. Chairman?

CHAIRMAN FERRIS: Yes?

COMMISSIONER FOGARTY: May I pursue the jurisdictional question? I personally believe that the Commission probably could take judicial notice of the fact that the campaign is already well underway and also that President Carter and Vice President Mondale intend to run for reelection. But I do have a problem, and I would like to explore it with the General Counsel with respect to the standing of the Committee, Carter-Mondale Committee, before the Commission at this time:

The theory of this order is that the ruling is based on the assumption that Carter-Mondale—that they will be qualified candidates at the time of the broadcast. However, it seems to me—now, that is an assumption. It seems to me that 312(a) (7) requires the candidate to be qualified before he has standing to request time, and I wonder how you explain that apparent contradiction?

MR. BRUCE: Well, I think it is clear here that we have, on the complaint before us and the response to it, a real controversy between the networks and the candidate. The candidate has made a representation that by the time he intends to use the time he will be a legally

qualified candidate, and that contention is basically undisputed.

I think we have a kind of controversy of importance that this Commission has some responsibility under the circumstances to resolve. I think it would be—to find that we can not reach complaints until we have, in all circumstances, until we have a fully qualified candidate would mean that in fact 312(a)(7) rights might not be fully enforceable until some period after an announcement or after qualification. I am not sure that Congress intended to so limit the Commission's jurisdiction under Section 312(a)(7).

That is not to say, I think, that a network could not raise, as one of the factors for declining to offer time, uncertainty about the qualifications of a candidate. If a relatively unknown candidate came to the networks and made a representation that he by a certain date would be qualified in ten states, I think the network could use its uncertainty about whether or not that qualification would occur as a factor in deciding whether to make an offer at that time.

But we don't have that case here because the three networks really have not attempted, I think for fairly obvious reasons, to raise any question about the qualifications of the particular complainant here to be a legally qualified candidate.

I am concerned that simply to find a barrier presented by the procedural problem would limit the Commission's ability to adjudicate complaints, especially when potentially there might be a reasonable claim for access after an announcement, and I think the problem is that 312(a)(7) does tie us into procedures that provide for, as in this case, the filing of a complaint and response time. It does take the Commission some time to resolve those controversies, and if we take the position that we can not adjudicate those controversies until qualifications are assured, I think it means in effect that

candidates have no rights under Section 312 (a) (7) for a period of perhaps 30 to 45 days after announcement. It could be that result.

And I don't think it is necessary for the Commission to take the position that we can't resolve the complaint. I think in this case there are some very overriding interests in providing some sort of a statement of the Commission's views on reasonable access issues, and I think it is clear in this case that there is an interest in this controversy that goes beyond the interests of the particular complainant, and it is obvious that candidates from other parties have an interest in the outcome here.

I personally do not see this issue as a partisan one in any respect. It seems to me that there has been, in the discussion of this case, a clear interest across the range in how the Commission is going to apply 312(a) (7) in this election campaign.

COMMISSIONER FOGARTY: So it would be your position that it would be ridiculous, I guess, for the Commission to find any of the major candidates, Reagan, Connelly, or Carter, or Mondale, unqualified, to seek relief under 312(a) (7).

MR. BRUCE: It would seem to me that if we had, you know, a similar case come before us in which the networks did not raise any issue about the qualification of the candidate at the time the request was made, that the Commission should not shy away from resolving the controversy. I think there is an important role for the Commission acting in this area. This is a very difficult statute, and it seems to me that one result of this ruling will be to provide some sort of general tone and direction with respect to the dealings between candidates and the networks. It is a very difficult area for the Commission to deal with on a complaint basis.

COMMISSIONER LEE: It goes,—I assume it will go to court either way, so we will find out.

MR. BRUCE: We are expecting that.

COMMISSIONER LEE: There is a little minor, relatively minor point: We have generally sought specificity, and here the complaint is against the three networks. Carter-Mondale didn't want time on all three, did he?

MS. MARGOLIS: No, no.

MR. SHIBEN: He requested time on all three, and under the assumption that he would get time on at least one.

COMMISSIONER BROWN: But there are indications in the record that in fact they were only seeking time on one.

MR. SHIBEN: But he was turned down by all three.

COMMISSIONER LEE: They would have settled for one.

MR. SHIBEN: If one network was offering—

COMMISSIONER LEE: One offered them five minutes, didn't they?

MS. MARGOLIS: BCS offered two five-minute segments.

COMMISSIONER BROWN: Mr. Chairman?

CHAIRMAN FERRIS: Yes.

COMMISSIONER BROWN: I agree with Commissioner Lee and I think with Commissioner JOnes. This for me is a very, very close case, particularly with respect to ABC which did make an offer of an indefinite amount of time in January, and also to a lesser extent to CBS which offered some time in December. I don't like at all—I don't think any of us do, being in the position of second-guessing the network, and also, in some cases, second-guessing the candidates and their judgements about what time they need over the air; but the fact of the matter is that Congress in the statute gave us that role. We are the ones who have the obligation to decide whether or not the response of the broadcaster or here the licensee was not unreasonable, and I agree with

Commissioner Jones that that is the proper characterization.

On the facts, it seems to me that we follow the Bureau's recommendations. There were two significant decisions that we are making. I don't consider the question of whether or not the networks were intended to be covered by 312(a)(7) to be a significant issue, given the state of the law and the Commission's treatment of the networks in this area in the past.

The two significant decisions that we are making are, one, under the facts of this case, given the facts of this particular campaign, December of 1979 is not too early for the 312(a)(7) "reasonable access" requirements to attach to broadcasters generally; and, secondly, that the response of CBS, given the facts of this case, with an offer of two five-minute segments on a particular day, one of the days requested by Carter-Mondale was unreasonable.

Those are the two concrete, factual things that we are deciding here, and the Commission's analysis, and I believe that analysis is set forth in the order, is that the ABC response with time in January was unreasonable, given the fact that Carter-Mondale indicated that they wished time close to the announcement of the candidacy for a full discussion of the issues that would be involved in the campaign for a full statement setting the tone of the official campaign at or about the time of the official announcement of the campaign.

I don't think—at least my feeling is that December of 1979, for this particular campaign, is not too early, and here we can make an objective judgement. There are objective indicia out there, and they are recited in the order, that in fact both the Democratic and the Republican campaigns for President are well underway today.

Having made that objective determination, then we have to attempt to balance the needs of the candidate as cited in its pleadings against the needs of the—or

the objection of the networks or the broadcasters recited in their responses.

Given the fact that the Carter-Mondale people set forth, I believe, five or six different dates during the month of December for making this request, I come down deciding that ABC's response of "No, you can't have that time in December; you can have it in January" was not a reasonable response, was an unreasonable response to the candidate's request.

Also, given the fact of the nature of the statement that Carter-Mondale indicated they desired to make, I also conclude that CBS's response of "No, you can't have a substantial block of program time; you must limit yourself to two five-minute segments on a given day," was not responsive to the candidate's needs.

And in the case of both ABC and CBS, not to mention NBC, there were, as I read the record, no indications of countervailing considerations that were sufficiently strong or nearly strong enough to outweigh the candidate's needs in this particular case.

Now, to put a gloss on the decision, again from my perspective, I recognize that each and every one of these cases does get us involved on the periphery of First Amendment concerns, and that if the Commission is going to make the statute work, it has got to make it work within the confines of giving, permitting as much discretion to broadcaster editorial judgements as we possibly can, and that I intend to do.

On the other side of it, I think after the adoption of 312(a)(7), broadcasters have to recognize that it is no longer their role to decide when a political campaign starts for purposes of political advertising. In fact, it appears in this case that the networks decided the campaign has started for purposes of news coverage, but not for purposes of political advertisement. There was mentioned that the decision that the Bureau is recommending the Commission reach today may have the effect of—

may result in—a large number of requests for large blocks of program time for announcements in December or at some other point.

My approach to that is to decide each of these cases as they come before us. That is what the broadcaster is going to have to do.

I can certainly conceive of situations in which multiple requests by candidates, whether Presidential or local, not covered by 312 (a) (7) but covered by the Public Interest Standard, would have a great disruptive impact on broadcasters trying to meet their other obligations or simply trying to make a dollar with their programming.

And I can conceive of situations where I would be impelled by concerns about disruption to say that the broadcaster was not unreasonable in responding. But that is not the case before us now, and when the case—when that case—does reach us, if ever, we can decide it on the facts that exist then.

So I am going to vote in favor of the item.

COMMISSIONER WASHBURN: But would you entertain a question, Mr. Brown, on that?

COMMISSIONER BROWN: Sure.

COMMISSIONER WASHBURN: In September when Senator Pressler announced his candidacy, there were five announced Republican candidates in the race. Supposing he had been denied time when he announced in September? Would you say that that was a reasonable or unreasonable action by the—

COMMISSIONER BROWN: I would decide—I would try to decide—that case in the light of all the facts and circumstances that Senator Pressler presented to the Commission. I am not aware that he did present any facts or circumstances to the Commission. He—I think—I am going to yield in a moment, but I want to give you a full answer.

I think it is very important that we not decide these cases or not react to the case that happens to be before us, which has been fully briefed, by asking questions

about some other case that might come before us or might have come before us, that hasn't been fully briefed.

In a way I guess I feel it is somewhat said that we have got to make a determination over whether something was reasonable or unreasonable, because unreasonable people are somehow not quite all there. And that is not at all the kind of determination that we are trying to make. The determination that it seems to me we are forced to make in this case is a very near run thing. And—well, we ultimately have to make a determination about whether or not a broadcaster's position was reasonable or unreasonable. It is like shading in the facts are going to of necessity affect that ultimate determination.

COMMISSIONER WASHBURN: You say the broadcasters will no longer have the choice of when the campaign starts. Who does then have the choice?

COMMISSIONER BROWN: I was once a broadcaster. No, I wasn't. I was once a general counsel to a broadcast operation, Commissioner Washburn, and we went through two or three political campaigns while I was there. And at some point, as we approached the campaign season, someone would walk into my office and say, "Ty, has the campaign period started yet? Do we have to start giving equal opportunities and all that kind of stuff?" And my response for a while would be, "No, it hasn't started yet." Or "It is too early. It is just too early." You know, we are not going to block up the air waves with this political campaign stuff this early.

CHAIRMAN FERRIS: Would you quote some Latin phrase, which lawyers usually rely upon when they don't have a good reason.

(Laughter)

COMMISSIONER BROWN: We didn't learn Latin phrases in the ghetto.

(Laughter)

COMMISSIONER BROWN: What we have got to do is look for the objective, the objective—

COMMISSIONER WASHBURN: Well, as I read you then, the decision would be made case by case as they came up?

COMMISSIONER BROWN: That is right, and it is also important to recognize—

COMMISSIONER WASHBURN: And there would be no precedent set by what we do today, if we do anything today?

COMMISSIONER BROWN: The precedential value of cases such as this it seems to me is—is very minimal—because they do turn on their particular facts.

I think it is also important for the candidate to recognize that we are not here saying today if we adopt the Bureau's item that an individual candidate gets to decide when the reasonable access rights or privileges attach. That item looks toward objective indicia that the campaign is underway.

So the announcement, for example, by Senator Pressler, or Jimmy Carter back in 19— the guy was running for President four years before the election. That doesn't necessarily objectively determine that the campaign is underway.

That is what, if the broadcaster and the candidate force us to do it, that is what we have got to ultimately decide on the basis of objective indicia.

COMMISSIONER WASHBURN: But this item gives overriding importance to the candidate's own decision when his needs require this time.

COMMISSIONER BROWN: It doesn't—it doesn't in my judgment.

COMMISSIONER WASHBURN: So it has got to rub off on other candidates, even though you say it is going to be on a case by case basis.

CHAIRMAN FERRIS: I certainly hope it does rub off on other candidates. I think what we are doing here, if we adopt this order, is we are saying that a candidate does have some control over making the determination

when he or she is running for a political office, not just some media licensee making a judgment.

COMMISSIONER WASHBURN: Some control, yes. But John Connally in July of '79, supposing he said, "The campaign has started for me. I want the time."

CHAIRMAN FERRIS: Well, I think that in a situation like that I think we could apply the same criteria we have here from the standpoint of being a candidate for that office, being a bona fide candidate for that office, and requiring any requests to the networks to be treated on an ad hoc basis, not on the basis of some predetermined judgment as some arbitrary date selected unilaterally by them will apply to every candidate for every office. And that is the characterization of the events that we have here.

And I think that it would certainly apply. Now how one makes a value judgment between that candidate, that effort, that particular campaign they are involved in, and the consideration, good faith consideration, by the network of that specific request should all be factors that should be considered by us.

I think—I want to address one point that Commissioner Brown made that when you talked about us second guessing the editorial judgment of the networks and their determination. I don't think any of this is editorial judgment. I think it is economic judgment. It is not the editorial side of the networks that are making these judgments.

Matter of fact, it was very interesting to me that one network actually pledged that if there was some characterization of 312(a)(7) that required some form of consideration as it is reflected here, it would inhibit to a great extent their coverage in their news department of the political activities that are taking place. That to me is a very interesting analysis of that entity, separation of the journalistic function from its economic interests, because I, you know—the very fact that the judgments

that would be made with respect to the coverage and non-coverage of news would be orchestrated in any way by their economic self-interest with respect to whether they sell time or not, to me is not the type of expectation I have of the journalistic activities of networks.

It surprised me that that was actually even alluded to by one of the networks.

COMMISSIONER BROWN: I don't attach something holy to the word "editorial." All I meant to indicate by the use of the word "editorial" was that it is a judgment affecting the timing of programming. It is a content judgment about programming, and to that extent it is editorialized. So that most—or many—editorial judgments by many media are premised on some economic benefit that will accrue to them as a result of it.

But I think we ought to recognize that when we go into this area we are in the area affecting editorial judgment in the sense that I just described. And I don't like doing that, but that is what Congress says that we shall do in these circumstances.

I must say that I guess I like doing it a little better than leaving a situation—leaving this situation—completely, such that the networks can simply say, "Well, until April of 1979, it is too early, and we are just not going to get involved." That is the other alternative.

CHAIRMAN FERRIS: I wanted to take, if I may, just take issue with another statement of Commissioner Brown's and that is minimizing the precedential value of what the Commission does today, if it adopts the order as recommended by the Bureau.

It seems to me that we will establish a precedent for John Connoly and for Ronald Reagan and for Howard Baker and for the other major candidates. And I certainly, if I were representing their campaign committees, I would advise them to come in and site the Carter-Mondale Committee Decision if they have any trouble getting time themselves on the three networks.

COMMISSIONER QUELLO: I think this decision recognizes the campaign of 1980, so to speak, has already started, but that doesn't mean it recognizes that in December of 1984 that that campaign, '83, the next Presidential campaign will have started.

I think Commissioner Brown is right. At that time we are going to have to look at the atmosphere which surrounds us to determine whether the campaign is in full swing. And I think it is—

MR. SHIBEN: It certainly has started on the news anyway, being in full swing.

COMMISSIONER QUELLO: It is in the papers. It is on the news.

MR. SHIBEN: It is on the papers, and when it isn't pulled off by Iran.

COMMISSIONER QUELLO: In your periodicals. It is hard to pick up anything today without reading about the Presidential campaign that we are involved in.

MR. SHIBEN: I do want to say, though, I really believe that the basic judgment is programming and editorial rather than economic. I mean, I just want this record to reflect that is my opinion.

COMMISSIONER WASHBURN: Could I ask a question of the general counsel? You stressed the point, and the item stresses the point, that the networks have not given sufficient consideration to the candidates' needs.

Is there a possibility then that they could come back to us and address that subject more thoroughly and try to convince us that they have given such needs consideration? And if so, then you are—you are in for some more time.

MR. BRUCE: Well, the item doesn't foreclose that, because what we have done is we have found a response that simply fails to address a relevant factor, relevant concern.

And—and I think that all the discussion of the weight that candidates's interests get is in that context, that what—the reason that the item places such weight on it

is that in the particular case before us none of the networks really made any attempt to show that their offer of time was responsive, either to the particular request or was directed and took into account any weighing of the candidate's interests.

So I—you know, I don't think that we could anticipate what would happen in response to this ruling. We simply found on the basis of the response that has been given that the networks—all networks—were unreasonable because they were—they inadequately addressed factors they should have weighed.

And these issues—

COMMISSIONER WASHBURN: Are you saying that the could return to us then with a better description of how—

MR. BRUCE: I—

COMMISSIONER WASHBURN: That they did weight these matters?

MR. BRUCE: Our decision doesn't rule that out.

MR. BRUCE: Our decision doesn't rule that out. I think that is implicit in the decision.

CHAIRMAN FERRIS: But in that case, there would be a presentment made at that time as to what the specific factors were in making a determination then, and then be a judgment by the Commission as to whether or not those factors were within the requirements of 312(a)(7) and were reasonable.

MR. SHIBEN: I think, as Commissioner Brown said, then you would have another case before you.

COMMISSIONER QUELLO: Does that require a petition for reconsideration?

MR. BRUCE: I suppose it would. I just want to say, as just a general comment on Section 312(a)(7), the decisions that the Commission deals with here are agonizingly difficult because they involve such a very difficult balancing, and I think that we, in addressing a particular complaint, we have tried to look at it through the lens and through the perspective that the networks did, and

what we are finding, that look that they gave it was deficient, and there isn't any easy way. I am afraid that probably there will be more of these complaints, and the Commission is going to have to deal with them.

I know right after the Act was adopted, the Commission, in a primer, did strongly stress that the networks and candidates and their representatives should attempt to work out, at the beginning of the campaign, an overall approach to these issues, and I think obviously that isn't going to eliminate all complaints or all controversies.

But we are faced here with an isolated decision and decisions that are not well explained, and I think on the face of the record before us, there is no alternative, real alternative, but to find that their responses were inadequate and unreasonable.

COMMISSIONER BROWN: Does the record indicate how many minutes of prime time there are in the month of December?

CHAIRMAN FERRIS: 5,529—

COMMISSIONER BROWN: 5,600 minutes.

CHAIRMAN FERRIS: —minutes are there—

COMMISSIONER BROWN: 5,600 is what I recall.

MS. MARGOLIS: I think it is stated in the reply.

COMMISSIONER BROWN: 500 half hours.

COMMISSIONER JONES: 5,400 minutes. It is on page 20.

CHAIRMAN FERRIS: 5,400 prime time minutes.

COMMISSIONER BROWN: 5,400 minutes, and we are talking about 30 out of those 5,400 minutes, with a possibilily of some other requests. Is that right? Is that about what it is?

CHAIRMAN FERRIS: That is the order of magnitude.

COMMISSIONER QUELLO: Well, Mr. Chairman, proceed.

CHAIRMAN FERRIS: Questions? Any further discussion? The question then is on the adoption of the memorandum opinion and order, finding the three net-

works acted unreasonably in discharging the obligations imposed upon them by 312(a)(7) and instructing that the three networks advise the Commission how they intend to fulfill Section 312(a)(7) on or before November 26th, 1979. All in favor say "aye."

(There was a chorus of "ayes.")

CHAIRMAN FERRIS: Opposed, "no."

(There was a chorus of "noes.")

CHAIRMAN FERRIS: The "ayes" have it.

COMMISSIONER BROWN: Mr. Chairman, I believe you have some editorials on the item for me?

CHAIRMAN FERRIS: Yes.

COMMISSIONER QUELLO: And I will have a statement.

COMMISSIONER WASHBURN: I will have a statement.

COMMISSIONER LEE: I will have a statement.

(Pause)

CHAIRMAN FERRIS: We can finish complaints and compliance.

(Whereupon, the Commission meeting went off the record at 3:08 p.m.)

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re:

Complaint of the
Carter-Mondale Presidential
Committee, Inc.

CBS INC. PETITION FOR STAY

CBS Inc. ("CBS") hereby petitions the Commission to stay its decision in this matter released on November 21, 1979, holding that CBS's determination not to sell one half-hour of program time to the Carter-Mondale Committee, and instead to offer two five-minute programs, was unreasonable. The Commission ordered that "each network is instructed to advise the Commission as to how they intend to fulfill their Section 312(a)(7) obligations on or before November 26, 1979." Memorandum, Opinion and Order at 23.

The grounds for this petition are as follows:

1. CBS is today filing a Petition for Reconsideration of the Commission's decision, urging that the Commission reconsider its finding that CBS' offer to sell two five minute programs and not at this time to sell half-hour programs is unreasonable.

2. If reconsideration is denied, CBS will seek review in the United States Court of Appeals for the District of Columbia Circuit of the Commission's decision.

3. The briefing, argument and decision of that review proceeding cannot possibly be concluded by Monday, November 26, 1979, the date on which the networks have been ordered to inform the Commission as to how they intend to comply with the "reasonable access" provision

in this matter. The Commission required thirteen days to decide the present controversy and an additional day to issue its decision.

4. The Carter-Mondale Committee does not seek to purchase time until the December 4-7, 1979, period, and indeed President Carter has not yet announced his candidacy for re-election.

5. We believe that that decision raises substantial questions. The constitutionality of Section 312 has never been decided, and the constitutional questions are substantial. The Commission's decision also presents substantial statutory and administrative law questions which require judicial review.

6. If reconsideration is denied and a stay is granted, CBS will undertake to immediately file a Petition for Review in the Court of Appeals; unless the Court orders otherwise, will be prepared to file its brief on the merits with the Court of Appeals within two business days after denial of its Petition for Reconsideration; and will otherwise seek to expedite the Court of Appeals proceeding.

ACCORDINGLY, CBS respectfully requests that a stay of the Commission's order be granted pending reconsideration and, if reconsideration is denied, pending judicial review.

CBS INC.
by

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November 21, 1979

[Certificate of Service Omitted in Printing]

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re:

Complaint of the
Carter-Mondale Presidential
Committee, Inc.

CBS INC. PETITION FOR RECONSIDERATION

CBS Inc. ("CBS") hereby petitions for reconsideration of the Commission's order in this matter released on November 21, 1979, holding that CBS's determination not to sell one half-hour of program time to the Carter-Mondale Committee, and instead to offer two five-minute programs, was unreasonable. The Commission ordered that "each network is instructed to advise the Commission as to how they intend to fulfill their Section 312(a)(7) obligations on or before November 26, 1979." Memorandum, Report and Order at 23.

At the outset, we believe it is important to make clear our belief that the decision of CBS not to sell at this time a half-hour of prime time to the Carter-Mondale Presidential Committee was an editorial decision, no different from the decisions, upheld by the Supreme Court in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973) (*"CBS* v. *DNC"*), not to sell time for editorial advertising. We believe that the Commission in overriding that editorial decision violated the First Amendment and the Communications Act, and that it acted arbitrarily and capriciously.

The decision of the Commission finding CBS' judgment to be unreasonable does violence to the statutory purpose. The legislative history of Section 312 clearly

shows that no drastic change from Commission requirements was intended, and that the legislation was designed to do no more than to codify existing practice. *CBS* v. *DNC*, 412 U.S. at 113-14 n.12. We also note that the legislative history of Section 312 strongly suggests a Congressional purpose to shorten, not extend, the length of political campaigns. *See S. Rep.* 92-96, 92d Cong., 1st Sess. (1971); *see also* 47 U.S.C. § 315(b) (1976) (limiting most favorable media charges to 45 or 60-day periods before elections). CBS practice during the past decade has been to decline to sell time in half-hour segments this early in Presidential primary campaigns. The Commission's disregard of licensee judgments and the substitution of candidate judgments * in this sensitive area is particularly inappropriate in view of the political considerations involved when the President himself seeks access to the media. See *Democratic National Committee* v. *FCC*, 460 F.2d 891 (D.C. Cir. 1972). Further, the Commission's decision fails to adequately explain its departure from its own prior precedent in which it affirmed a licensee's rejection of a request for a 30-minute prime time, as opposed to 5-minute program. *Letter to Paul A. Talmey*, 31 R.R.2d 1039 (1974). Under the circumstances we believe that the Commission should grant reconsideration, and deny the Carter-Mondale Committee's complaint.

In this Petition for Reconsideration we will not reiterate the arguments set forth in our original comments. We do wish to make clear that we believe that the Commission is without jurisdiction to require that the networks sell time for political programs under Section 312 ** and that we believe that Section 312(a)(7),

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* See Memorandum, Opinion and Order at 13.

** Section 312(a)(7) by its terms only authorizes the Commission to revoke station licenses or construction permits. At the time that Section 312(a)(7) was enacted in 1972 Congress was

particularly as interpreted by the Commission in this case, violates the First Amendment.*

We believe, however, that one significant element of the Commission's decision requires further comment,

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of course aware of the existence of networks, and, yet the plain language of the provision applies only to stations. Discussions in the Committee Reports and Congressional hearings and debates concerning Section 312 were in terms of reviewing an individual station's performance at license renewal time. So far as we are aware, there was no suggestion that Section 312 should be made applicable to networks or that networks were failing to provide federal candidates reasonable opportunities to purchase network time.

* There can be no question but that an access requirement applicable to the print media would violate the First Amendment. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974). The Eighth Circuit, moreover, has concluded that the First Amendment would be violated by creation of an access requirement applicable to cable television, and strongly implied that such a requirement would be unconstitutional in broadcasting. *Midwest Video Corp.* v. *FCC*, 571 F.2d 1025 (8th Cir. 1978), *aff'd on other grounds*, 99 S. Ct. 1435 (1979). We believe that nothing in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), upholding the Commission's personal attack rules, or other decisions upholding Commission adoption of the prime time access rule in any way suggests that granting access to particular speakers would be constitutional, where the licensee has not made the initial determination to present program material which triggers a reply requirement.

Indeed, as we pointed out in our original comments (p. 15), while *CBS* v. *DNC*, 402 U.S. 94 (1973), did not hold that granting rights of access to political candidates would be unconstitutional, many of the constitutional considerations discussed in the *CBS* case suggest that granting such a right of access is inconsistent with the First Amendment. Moreover, given these constitutional issues, *CBS* v. *DNC* requires at a minimum that the Commission not do what it did in this case—substitute its judgment for the good faith judgment of broadcasters on a question of editorial judgment. We note that the Commission has not decided the constitutional issues. Report and Order, Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, 43 R.R.2d 1029, 1047 (1978); Memorandum, Opinion and Order at 15.

concerning CBS' alleged failure to consider the needs of the candidate. We believe that Section 312 was designed to apply equally to candidates similarly situated, and the desire of one particular candidate to present his views in a particular format should not affect the reasonableness of a licensee's determination that it is too early in the campaign to begin selling time, or that it is too early in the campaign to begin selling time in half-hour segments.

In any event CBS has considered the needs of the candidate. Thus:

1. CBS considered the desire of the Carter-Mondale Committee to purchase a half-hour of time, and concluded that, at this early stage in the campaign, the sale only of 5-minute segments would be reasonable. In that connection we believe it is pertinent that the only special circumstance alluded to by the Carter-Mondale Committee in seeking to purchase time was the upcoming Iowa caucus on January 21, 1980 as referred to in the October 11, 1979, letter from Mr. Rafshoon to Mr. Backe, attached to the Carter-Mondale complaint. We also note that the average audience for 5-minute political programs of major candidates in the CBS Television Network in the last decade was about 67% greater than the audience for half-hour political programs.

2. CBS considered that the first Democratic presidential primary will not occur until February 26, 1980, and that there will be thirty-five more primaries in additional states during the period March 4, 1980 to June 3, 1980. CBS also considered that during the pre-convention period, Presidential campaigns primarily focused on delegate contests in individual states.

3. CBS considered the fact that the Democratic National Convention will not convene until August 11, 1980, some nine months after the period for which the

Carter-Mondale Committee requested the right to purchase time. Similarly, the Republican convention will not convene until July 14, 1980.

4. CBS considered the importance of treating President Carter equally with his Democratic and Republican opponents in the sale of time.

5. CBS considered that President Carter had not yet announced as a candidate, and that his formal campaign will barely have begun during the period when time is sought to be purchased.

CBS did not consider, and does not believe it was appropriate to consider, the content of the particular program for which the Carter-Mondale Committee wished to purchase time, the substantive importance of the issues that the Committee intended to address; nor was CBS offered the opportunity to view the program. In this connection, it is both the Congress' and the Commission's strong policy under Section 315 that a licensee play the most limited possible role in determining the contents of candidates' appearances. *E.g., Farmers Educational & Cooperative Union* v. *WDAY, Inc.*, 360 U.S. 525 (1959); Public Notice, *Use of Broadcast Facilities by Candidates For Public Office*, 24 F.C.C.2d 832, 873-76 (1970).

While we also believe that the circumstances of the individual candidate are generally not pertinent to the question of reasonable access under Section 312, if the candidate's individual circumstances are to be considered, we cannot help but note that President Carter has had substantial opportunity for the presentation of his views on the CBS Television Network. Thus, since October 1 President Carter has appeared on the CBS Television four times to present presidential addresses for nearly two hours, in addition to 52 appearances on regularly scheduled news programs. Indeed, the District of Colum-

bia Circuit has recognized that the President of the United States has unique opportunities to present his views in the broadcast medium. *Democratic National Committee* v. *FCC*, 460 F.2d 891, 905 (D.C. Cir. 1972) ("No matter who the man living at 1600 Pennsylvania Avenue is he will be subject to greater coverage in the press and on the media than any other person in the free world.").

In addition to considering the situation surrounding the candidates for President, CBS also considered other factors which it believes make it appropriate to decline to sell the Carter-Mondale Committee a half-hour of time at this early stage of the campaign and to limit the offer to five-minute segments.

First, CBS considered that there are presently a large number of announced candidates for President; that there are already, or there is a reasonable expectation that there will be, at least three major candidates for the Democratic nomination and eleven major candidates for the Republican nomination; that other candidates have already requested the right to purchase half-hour blocks of time; that rarely if ever has CBS received so many requests to purchase half-hour time segments so early in the Presidential primary campaigns (p. 4 of CBS Comments); that the cost of a half-hour of time on the CBS Television Network ranges from $172-186,000 in prime time;* that in the 1976 primaries, 15 Presidential candidates qualified for a total of more than $24.1 million in Federal matching funds;** that many candidates can thus afford to purchase time; that in the past minor candidates for President have sought

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* The candidates will also be charged an origination fee in prime time of $1662.

** H. Alexander, Financing Politics: Money, Elections and Political Reform, 246 (CQ Press 1976).

to purchase and have purchased time on the CBS Television Network (pp. 9-10, CBS Comments). Once time is granted under Section 312 (a) (7), of course, federal law operates to compel the sale of equal time to all other qualified candidates regardless of their own special circumstances, and of their own "needs."

Second, CBS made the editorial judgment that the disruption of its program service in the prime time this far in advance of the nominating convention would unreasonably interfere with its overall service to its viewing audience. CBS also considered that its owned and affiliated stations have received and will receive many requests from local federal and state candidates to purchase program time for political advertising, which requests will be acted upon by the stations in light of all relevant local circumstances. Those requests which are granted will, of course, further interrupt other programming.

Third, CBS considered that its past practice has not been to sell half-hour segments of time this early in the primary campaigns.*

Finally, CBS considered it essential that, in applying its political sales policies, they be implemented as uniformly and fairly as possible and not only to address

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* In its original comments (pp. 7-8) CBS stated that "the CBS Television Network has not previously sold half-hour time period for Presidential candidates in the pre-convention period. . . ." See Memorandum, Opinion and Order at 23. On further review we find that this was the case in connection with the 1972 and 1976 primary elections. Prior to that, available records indicate that in the 1964 and 1968 elections several half-hour periods were sold prior to the conventions—but none before May of the applicable year.

the campaign needs of a particular candidate. It would appear clear that federal law contemplates nothing less.*

ACCORDINGLY, RECONSIDERATION SHOULD BE GRANTED.

CBS INC.
By

/s/ Ralph E. Goldberg
RALPH E. GOLDBERG
51 W. 52 Street
New York, New York 10019

/s/ Joseph DeFranco
JOSEPH DEFRANCO
1800 M Street, N.W.
Washington, D.C. 20036

/s/ Mark W. Johnson
MARK W. JOHNSON
1800 M Street, N.W.
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Its Attorneys

Of Counsel:

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1666 K Street, N.W.
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November 21, 1979

[Certificate of Service Omitted in Printing]

* Since the Commission's Memorandum, Opinion and Order was not released until after 3:00 p.m. today, this Motion does not deal with all new matters mentioned therein—none of which, we believe, supports the Commission's decision.

[LETTER FROM
NATIONAL BROADCASTING COMPANY, INC.]

NBC
National Broadcasting Company, Inc.
Howard Monderer
Law Department
Vice President, Law
Washington

1800 K Street, N.W.
Washington, D.C. 20006 202-833-3600

November 23, 1979

Honorable William J. Tricarico
Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: Complaint of the Carter-Mondale
Presidential Committee, Inc.,
FCC 79-750

Dear Mr. Tricarico:

National Broadcasting Company, Inc. ("NBC") files this submission in response to the conclusion of the Commission that the NBC Television Network's refusal to sell to the Carter-Mondale Presidential Committee ("Committee") a one-half hour time period between 8:00 and 10:30 p.m. ET on December 4, 5, 6, or 7, 1979 * was

* As NBC pointed out in its Response, the Committee has made it clear that no other length of network time and no other dates are satisfactory to it, and it was therefore unnecessary for NBC to consider alternative arrangements. That such alternatives, clearly unacceptable to the Committee, were not offered simply cannot be considered to constitute an " 'arbitrary, blanket' ban", as the Commission suggests (Memorandum Opinion and Order relased November 21, 1979 ¶ 21). As NBC emphasized in its Response, it has no rigid policy as to the selling of time to candi-

unreasonable because "NBC has apparently given no consideration to the Committee's determination that 'the most effective way to present the candidate and his record, at the beginning of the campaign, was to broadcast this half-hour program showing President Carter performing the duties of his office as President of the United States'; nor has it considered the fact that the purpose of the proposed program is to set the tone for the President's entire campaign and that this purpose cannot be accomplished at a later date." Memorandum Opinion and Order, Released November 21, 1979 (the "Opinion") at ¶ 36. Elsewhere in its opinion the Commission refers back to this statement in shorthand fashion, referring to the asserted failure by NBC "to give any consideration to the needs of the candidate in reaching its decision." (¶ 46) (*and see also* ¶ 31). The Commission elsewhere notes that in these circumstances the reasons NBC has "in fact given to support its decision are 'insufficient' and in the absence of further explanation" (¶ 37) the Commission refuses to find that NBC acted reasonably.

The Commission's General Counsel stated at the Commission's meeting which considered adoption of the Opinion that a network could respond to these conclusions by reconsidering its original decision and reweighing all relevant factors, including the "needs of the candidate" as an element in that balancing; the Commission's decision, he stated, did not rule out a network's returning to the Commission with its evaluation of all the factors, perhaps in the form of a petition for reconsideration. The opinion of the Commission confirms this. Accordingly, NBC respectfully requests that the Commission consider this letter as responsive to that statement.

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dates, but evaluates each request to purchase time on a case-by-case basis. Such evaluation was made here and NBC's decision not to sell the requested time was, in light of all the applicable factors, reasonable.

NBC wishes, at the outset, to assure the Commission that it did in fact take into consideration, in its initial decision, the "needs" of candidates for the office of the Presidency in general and Mr. Carter's expressed needs and desires in specific in assessing the Committee's request. See *Report and Order, Policy in Enforcing Section 312(a)(7) of the Communications Act* ("Report and Order"), 68 FCC 2d 1079, 1090 (1978); Opinion at ¶¶ 36, 46. In fact, each of the various factors alluded to by the Committee in explaining what it believed to be the appropriateness of its request was considered. NBC considered then and has, since the Commission's decision, reconsidered the needs of a campaign for the Presidency generally and Mr. Carter's expressed "needs" and "desires[*] as to the method of conducting his . . . media

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* While, as stated above, NBC has considered the Committee's expression of need and its expressed "desires", it has not undertaken to evaluate these expressed needs and desires. NBC questions the propriety of a network being obliged to assess, at Commission direction, the validity of a candidate's expressed needs as to his campaign or whether one candidate or another was more or less in "need" of the time in light of the state of his campaign (and his standing in the race). To compel a broadcaster to engage in such assessments and subject it to governmental review as to such assessment might well violate the Constitutional rights of both the candidate and the licensee under the First and Fifth Amendments as well as those provisions of the Constitution relating directly to the federal electoral process. (Were such an evaluation of need a proper factor, or course, President Carter, who as the incumbent holder of our nation's highest office has had daily television coverage, would be the candidate *least* in need of the time requested at this early date.)

Nor do we believe that any general need for time exists on the part of Presidential candidates at this date. While, to be sure, the Presidential campaign is a matter of national rather than purely local concern, it does not follow that the needs of Presidential campaigns generally with respect to such early and discrete events as the Iowa Caucus cannot be met adequately by the purchase of time on local stations.

campaign." * (Report and Order at 1089, n. 14) NBC has again, and separately, in light of the Commission's decision, weighed these considerations against other relevant factors including, as we described in our Response: the requirements of 315; the timing of the requested broadcast relative to the overall nomination campaign; the pool of available programming time; ** the number of other actual or potential candidates for nomination for the Presidency; and the extensive coverage which the NBC television network has already given to President Carter.***

In light of this weighing process we decline to grant the request made by the Committee for purchase of one

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* This factor was referred to in NBC's Response (at p. 6) and was among those originally considered by NBC.

** As part of the process by which it evaluated the request from the Committee, NBC examined the pool of available programming time and considered its adequacy in light of the Carter request and requests which might be made under Section 315 by other candidates. NBC has only 7 half-hour program periods available during the entire month of December. (NBC Response, pp. 4-5) Were NBC compelled to sell the requested time to the Committee and to make time available, as it must under Section 315, to the many other candidates who might then request it, it likely would be forced to remove scheduled hour programming. It simply does not have alternative half-hour programming readily available to fill out the remainder of the hour program periods thus vacated. This distinct scheduling problems which faces NBC in December (one which may vary from network to network and which does in fact vary for NBC from month to month) underscores the reasonableness of NBC's decision not to grant the specific request made by the Committee at this time.

*** The NBC Television Network has, of course, provided the public with extensive coverage of and information about President Carter. Since January 1, 1979, President Carter has made approximately 115 major appearances (speeches, messages, news conferences, interviews, etc.) on NBC. In addition, President Carter's picture or voice has appeared in approximately 115 reports in each of the "NBC Nightly News" and "NBC Today" programs since the beginning of this year.

half-hour of prime time on December 4, 5, 6 or 7, 1979. Notwithstanding the Committee's expressed desire for the time, it remains true that were the NBC Television Network to sell a half hour of prime time for use by President Carter at this time, on the basis upon which the Committee claims it, there would seem to be no principled basis on which the Network could refuse to sell a similar time period during prime time to every one of the many legally qualified candidates for the Democratic and Republican Party presidential nominations who might make a similar request. This is the effect of Section 315.* The other factors described in NBC's Response as militating against a grant of the request provide additional support for NBC's decision. NBC's judgment in declining to make available the requested time was reasonable and NBC's decision therefore must be affirmed even if the Commission would not have come to the same decision on its own. See *Straus Communications, Inc.* v. *FCC*, 530 F.2d 1001 (D.C. Cir. 1976).

The Commission must carefully consider both the statutory and constitutional limits to its ability to re-

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* Although the Commission's decision notes the unlikelihood that "all" of the candidates who have filed with the Federal Election Commission will have the "financial resources necessary to purchase a half hour of network prime time," (Opinion ¶ 42), it does not state and most certainly does not provide support for the view that a significant number of the candidates may not have such resources. The cost of a half hour of prime time on the NBC Television Network varies from $125,000-$150,000.

It should be noted, of course, that other candidates' time requests are not necessarily limited to those made under Section 315. Such candidate may obtain Section 315 time and then seek time of his own under the reasonable access requirements of Section 312(a)(7). Given the weight the Commission would seem to attach to a candidate's own "needs" and "desires", it might prove improper to decline to honor such request; the grant of such time would, of course, set in motion an entirely new round of equal time requests.

quire candidate access to broadcast stations.* (*See, e.g., Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94 (1973)). In this case, NBC's judgment refusing to make the requested time available was reasonable and that being so, the Commission should dismiss the complaint. See *Straus Communications, Inc.* v. *FCC, supra.*

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* It should be noted, for example, that the construction the Commission has put on the statute (§ 213(a)(7)) has the clear effect of extending by Government order the already lengthy Presidential campaign, despite the clear intent of the legislative draftsmen that the 1972 Amendments to the Communications Act *shorten* the campaign. *See, e.g.,* Sen. Rep. No. 92-96 (92nd Cong., 1st Sess.) at 28 (1971). The Commission's interpretation thus exacerbates rather than helps an already existing problem afflicting the political process; it also allows well-funded candidates (such as incumbents) to exercise their financial leverage at so early a stage as to threaten to drive out their poorer opponents even before the first primary is held. The statute and its legislative history do not suggest such an interpretation, nor do we believe the Commission's reading of Section 312(a)(7) generally is consistent with the limited scope of its draftsmen's intent. *See* Hearings on S. 382 Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration, (92nd Cong., 1st Sess.) at 103, 118, 120 (1971) (statement of Sen. Hugh Scott and joint statement of Sen. Hugh Scott and Sen. Charles McC. Mathias).

Further, the interpretation of the statute adopted by the Commission may well annul the legislative decision that broadcasters *not* be treated as common carriers. The Commission is, of course, without authority to make such determinations.

It should be emphasized that the statute on its face and most certainly as applied by the Commission in this decision, involves so clear an intrusion into licensee discretion as to raise serious questions of its constitutionality under the First Amendment. *See CBS* v. *DNC, supra.* Indeed, in his separate statement, Commissioner Quello, whose vote was crucial in light of the 4-3 division of the Commission, explicitly recognized the First Amendment risks posed by Section 312(a)(7).

In light of the time constraints created by the Commission's November 26, 1979 deadline, NBC respectfully requests the promptest possible notice of the disposition of the matter raised in this letter.*

Respectfully submitted,

HOWARD MONDERER
Vice President, Law, Washington
National Broadcasting Company, Inc.
1800 K Street, N.W.
Washington, D.C. 20006

[List of Recipients Omitted in Printing]

* By separate letter of this date NBC has sought a stay of the Commission's Opinion in the event that decision is not modified in light of this submission, as well as a stay pending consideration of this submission.

[LETTER FROM
NATIONAL BROADCASTING COMPANY, INC.]

NBC
National Broadcasting Company, Inc.
Howard Monderer
Law Department
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Washington

1800 K Street, N.W.
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November 23, 1979

Honorable William J. Tricarico
Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: Complaint of the Carter-Mondale
Presidential Committee, Inc.,
FCC 79-750

Dear Mr. Tricarico:

On November 20, 1979 the Commission adopted, and on November 21, 1979 released, its Memorandum Opinion and Order (the "Order") in this matter. The Commission set November 26, 1979 as the date by which NBC was to inform the Commission of how the Network intended to comply with the Order. In light of the imminence of the November 26, 1979 date NBC requests that the Commission stay enforcement of the Order pending the Commission's consideration of a letter of this date in which NBC seeks reconsideration of the Order. NBC believes such review will convince the Commission that NBC has acted reasonably and that no further action on NBC's part is required.

It is requested, however, that in the event the Commission should continue to believe that further action is

required by NBC to comply with Section 312(a)(7) notwithstanding NBC's request for reconsideration, the Commission stay the Order or any subsequent order requiring further action on NBC's part until NBC has had an opportunity to seek judicial review. NBC represents that such judicial review would be sought on the promptest possible basis.* Such a stay is appropriate here for a number of reasons.** Thus, the Commission itself, in its initial press release, has characterized its decision here as "far-reaching" and the Carter-Mondale Committee has noted that the case presented the Commission with "important questions of statutory interpretation which [the Commission] has not yet had an opportunity to address in a specific context" (Reply of Carter-Mondale Presidential Committee, Inc. at 1).

The statutory and constitutional questions raised by this case deserve prompt appellate review—review which could be threatened by mootness if the Commission's order, backed by the powerful sanctions of Section 312, is not stayed. Were NBC required to program against its judgment, the constitutional and statutory rights it asserts would be irreparably lost. Further, given the limitations imposed on NBC's own programming schedule by the absence of any significant number of half hour program time periods during December, and the likeli-

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* NBC is prepared to file a petition for review of an adverse decision of the Commission on the next business day after receipt of that decision and to file its brief on the merits on an expedited basis as ordered by the Court.

** In Complaint of *Accuracy In Media, Inc.* FCC No. 73-1232 ("Pensions"), the Commission granted NBC a stay to permit it to seek appellate determination of its stay application. (Order of January 23, 1974) The Commission authorized that stay even though its ruling, in contrast to that here, had been unanimous, and even though (again unlike this case) the Commission was of the belief that it had merely applied established doctrine to the facts of that case.

hood that it would have to meet equal time requests from other Presidential candidates, enforcement of the Order would require significant dislocation of NBC's programming schedule without the opportunity for judicial review. These dislocations could not be undone by subsequent court decisions. Indeed, it may well be that even if the Commission decision requiring a network to sell time to the Committee were reversed after the Committee's program had been broadcast, the network would still be obliged to make time available to other candidates under Section 315. On the other hand, the Carter-Mondale Committee apparently has already prepared the film it seeks to broadcast. Thus, speedy review would permit the important questions presented to be reviewed without necessarily prohibiting compliance with the Committee's request for time during the period December 4-7, 1979, should the courts so direct.

This Commission has, by a sharply divided 4-3 vote, rendered a decision of enormous consequence for the broadcasting industry and for the political process. It has done so although at least one member of the narrow majority has explicitly recognized the serious constitutional problems posed by the statute in question. The Commission's decision will affect profoundly the conduct of this Presidential campaign—and future campaigns. Should the Commission continue to believe that further action by NBC is required to comply with Section 312 (a)(7), the Commission's Order should be stayed to permit the promptest possible judicial review of that Order.

In light of the time constraints created by the Commission's November 26, 1979 deadline NBC respectfully requests the promptest possible notice of the disposition of the matters raised in this letter.

Respectfully submitted,

HOWARD MONDERER
Vice President, Law, Washington
National Broadcasting Company, Inc.
1800 K Street, N.W.
Washington, D.C. 20006

[List of Recipients Omitted in Printing]

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Political Broadcasting Complaint of the
Carter-Mondale Presidential Committee, Inc.

To: The Commission

PETITION FOR RECONSIDERATION OF AMERICAN BROADCASTING COMPANIES, INC.

American Broadcasting Companies, Inc. ("ABC"), by its attorneys, hereby petitions for reconsideration of the Commission's *Memorandum Opinion and Order* (FCC 79-750) released in the above-captioned matter on November 21, 1979.* In support whereof, the following is respectfully submitted.

Preliminary Statement

The complaint in this case concerns the request of the Carter-Mondale Presidential Committee, Inc. ("Committee") to purchase one half-hour of network program time between the hours of 8:00 and 10:30 p.m. during the December 4-7, 1979 period. ABC declined to accede to the Committee's specific request for a December 4-7 date, and subsequently indicated that it would make time available during the first week of January. The Commission's *Order* holds that this decision to make time available in early January, but not in early December,

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* The Commission's *Memorandum Opinion and Order* was not released until after 3:00 p.m. on the afternoon before Thanksgiving Day. This petition is therefore filed on the first day that Commission offices are open following the one-day Thanksgiving holiday.

was unreasonable. ABC and the other commercial television networks have been "instructed to advise the Commission as to how they intend to fulfill their Section 312 (a) (7) obligations on or before November 26, 1979." *Memorandum Opinion and Order*, para. 50.

The Commission's decision establishes new law with extremely far-reaching implications. In what is admittedly a case of "first impression," * the Commission has ruled that a major, if not controlling, criterion for determining when "reasonable access" begins is the expressed needs of individual candidates. This ruling has (a) removed a substantial element of licensee discretion traditionally associated with political broadcasting matters, (b) substituted the Commission's judgment for the good faith judgment of broadcasters as to when the sale of political broadcast time must commence and (c) embarked on a course which not only contravenes the First Amendment but is also harmful to the overall public interest.**

The Commission's decision that ABC was unreasonable in affording time in January but not in December does not specify what time earlier than January would be reasonable. Under the Commission's decision, presumably time earlier than the month of January that would more nearly meet candidate "needs", but not necessarily the specific dates and times requested, would qualify as reasonable. If the decision were read to require the sale of one of the specific dates and times requested, it would come perilously close to a judgment that candidates can dictate the particular time of ap-

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* *Transcript* of November 20, 1979, open-meeting, p. 8. The entire *Transcript* is attached hereto as *Appendix A*.

** The Commission's decision, unless overturned, also makes new law by extending Section 312(a) (7) to national networks as distinguished from stations.

pearance—a position for which there is absolutely no legislative support.*

Because ABC views this decision as directly and adversely impacting fundamental principles, ABC intends to seek immediate judicial review if the Commission denies reconsideration.**

Reasons for Granting Reconsideration

A.

We believe the acknowledged "first impression" nature of the case as well as its far-reaching implications, standing alone, warrant further examination of the critical questions presented. No matter how one attempts to limit the scope of this ruling,*** its impact will be felt by all broadcasters in all future federal elections.****

B.

The Commission's decision seriously distorts the meaning and purpose of Section 312(a)(7), ***** and unduly

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* While conceding that President Carter is not presently a "legally qualified candidate" under Commission rules, the Committee in this case nevertheless suggested that all requirements of Section 73.1940 would be met at the time of President Carter's formal declaration—and indicated that it was prepared to make the required showing. In granting candidate "standing" in this case and ruling that Section 312(a)(7) rights must be afforded without requiring such a showing in advance, the Commission has acted contrary to prior practice and established a potentially troublesome precedent affecting its administration of all political broadcasting matters.

** In a separate document filed simultaneously herewith, ABC requests that the Commission's order be stayed pending reconsideration and, if reconsideration is denied, pending expeditious judicial review.

*** See *Transcript*, pp. 22-23; 36-39; 42-43.

**** See *Transcript*, pp. 20-21; 36-39.

***** Our position that the Commission has misconstrued and misapplied Section 312(a)(7) includes the view that this statu-

complicates its future application. Without support from legislative history, and contrary to the Commission's recent interpretation of this statutory provision,* the Commission has drastically lengthened media coverage of federal election campaigns based almost exclusively on individual candidate judgments. Under this ruling, there may be no practical way for broadcasters to exercise any independent judgment and meaningfully respond to the requests of federal candidates in future federal campaigns who decide to inaugurate their candidacies at a very early stage and demand access based on their own alleged individual needs.

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tory provision is solely directed to station licenses and does not extend to the unique operation of national networks providing programming to affiliated stations. The Commission's general discussion and resolution of this jurisdictional point (*Memorandum Opinion and Order*, paras. 22-27) is particularly suspect in light of both the plain language of the statutory provision and the Commission's prior acknowledgment of the absence of any meaningful Congressional guidance as to the specific purpose of Section 312(a)(7).

* As the Commission noted in its 1978 *Report and Order* concerning enforcement of Section 312(a)(7) (68 FCC 2d 1079), the only relevant time periods associated with statutory enactment of "reasonable access" are the 60 and 45-day periods established in connection with the separate "lowest unit charge" provision. Indeed, the Commission on that occasion specifically looked to the 60-day (general elections) and 45-day (primary elections) periods as governing many situations involving a determination of *when* "reasonable access" must begin. 68 FCC 2d at 1091. Moreover, the standard the Commission now applies—i.e., individual candidate needs—was not even mentioned in the context of developing interpretative guidance for when the time for reasonable access should initially commence. *Report and Order*, 68 FCC 2d at 1091-92. Rather, the only discussion of this criterion occurred in the totally different and broader context of how broadcasters should attempt to accommodate candiate requests in terms of scheduling, broadcast frequency, etc., once political sales are already underway. *Report and Order*, 68 FCC 2d at 1090-91.

The Commission has turned its back on traditional standards of license discretion in the political broadcasting area * and, in the first major interpretation of when "reasonable access" begins under Section 312(a), has not only ignored its own precedent, but has adopted a new standard of the expressed needs of individual candidates that raises serious constitutional and statutory questions.

Clearly, if the Commission is to be the ultimate judge of when a campaign begins and the particular point when the sale of political broadcast time must specifically commence, it has assumed a dangerous dictorial role for the government in a highly sensitive area that involves both the larger political process and the content and selection of broadcast programming.** In overturning ABC's decision to begin the sale of political time in January rather than December based on the avowed needs of one political candidate, the Commission has thrust itself too deeply into the political process, and assumed an editorial role over broadcasters that violates First Amendment principles protected by the Communications Act.***

Contrary to the Commission decision,**** ABC did not act in a manner that was oblivious to the needs of candidates. As the Commission was previously informed, in the last national Presidential campaign ABC did not

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* See *Report and Order*, 68 FCC 2d at 1089; *Use of Broadcast Facilities by Candidates for Public Office*, 24 FCC 2d 832 (1970); *Anthony R. Martin-Trigona*, 67 FCC 2d 743 (1978); *Evelle Younger*, 69 FCC 2d 1495 (1978); *Charles Mark Furcolo*, 48 FCC 2d 565 (1974).

** The troublesome character of this type of decision-making is reflected in the open deliberations on this matter (see transcript of open-meeting attached hereto as *Appendix A*).

*** See *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973); *Paulsen* v. *FCC*, 491 F.2d 887 (9th Cir. 1974); Section 326 of the Communications Act.

**** See also *Transcript*, pp. 9-11.

afford program time until late April preceding the summer conventions. ABC's decision to advance that period by almost four months and to provide political time as early as the first week of January clearly was responsive to the requests that it was receiving from national Presidential candidates. These requests obviously reflected the individual needs of the candidates making them. ABC's decision to begin selling time in early January—well before the time period for political sales in prior years—represented an attempt to accommodate the overall needs of all candidates in the developing national campaign, not just the incumbent.

Notwithstanding, ABC believes the Commission has misconstrued the purpose of Section 312(a)(7) by focusing on the needs of individual candidates, as opposed to the needs of candidates in general in an overall campaign. This focus, we submit, distorts the process and places both the Commission and broadcast licensees in the dangerous position of effectively favoring one candidate over another. The standard the Commission relies on raises unusually sensitive constitutional and statutory questions. The difference between taking general needs of all candidates into account and relying on the particular needs and purposes of individual candidates is substantively dramatic. In our view, a standard that requires broadcasters to delve too deeply into the campaign objectives of individual candidates when time is requested or to weigh the nature or purpose of the political message they intend to convey is highly inappropriate and probably contrary to the Communications Act. See Section 315(a) of the Communications Act; *Farmers Educational and Cooperative Union* v. *WDAY, Inc.*, 360 U.S. 525 (1959). Similarly, the Commission's factual finding (*Memorandum Opinion and Order*, para. 36) "that the purpose of the proposed program is to set the tone for the President's entire campaign and that this purpose cannot be accomplished at

a later date" is inappropriate as a matter of law and highly questionable as a matter of fact.

Rather than applying Section 312(a)(7) equally to all similarly situated candidates, this decision permits one particular candidate (in this case the incumbent President) to assume a lead role in determining when to begin selling time and in what format, since licensee decisions looking to the overall campaign and all candidates have been declared unreasonable.

D.

The Commission's decision also minimizes and ultimately rejects such factors as the length of the campaign, the multiplicity of candidates involved and the potential degree of program interruption likely to occur. By rejecting these factors while exalting the factor of individual candidate needs, the Commission has failed properly to assess and weigh overall public needs and interests.

ABC's decision to defer the sale of political time until January—still nearly seven months prior to the first national nominating convention—attempted to assess the impact of such early political programming on the national audience it serves. Given the extended length of this particular campaign and the present multiplicity of Presidential candidates, we believe it is both reasonable and responsive to public needs to place some limitation on the period when half-hour network programs are devoted exclusively to political speeches and campaigning.* This does not mean, as we have previously emphasized, that campaign events are not fully and fairly reported in ABC news and public affairs programming—or that such news and public affairs coverage may not

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* See *Transcript*, p. 20, where Commissioner Washburn also notes that the factor of program interruption might be particularly aggravated here owing to the fact that the month of December is traditionally "given over in large part to the holidays."

significantly escalate.* It simply means that, based on past experience and an assessment of the events of the current campaign, that the public would not respond favorably to the program disruption associated with a parade of full-length paid political programs at this early, formative stage of the campaign.** Moreover, with respect to the specific request of the Committee, we were not uninfluenced by the fact that President Carter is in a unique position to command coverage of his views and positions on important matters. See, e.g., *Democratic National Committee* v. *FCC*, 460 F.2d 891, 905 (D.C. Cir. 1972).

As our original comments indicated, ABC's decision in this regard was also influenced by the sheer length of the 1980 Presidential campaign (36 state primaries running from late February to early June, followed by the general election process), the fact that during the pre-election period the campaign focuses primarily on delegate contests in individual states, and that, in addition to network political programs and advertising, our affiliated stations will have to accommodate the needs of local, state and federal candidates. Thus, throughout these many months of the 1980 political campaign, ABC network affiliated stations will be presenting not only net-

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* We strongly disagree with the suggestion that news and public affairs coverage of the campaign is a controlling factor in deciding when to begin the sale of half-hour political programs that interrupt normal programming. On the contrary, we believe that it is entirely reasonable and appropriate (indeed previous Commission interpretations would seem to support this approach) for ABC to consider the degree to which early political campaigning might unduly interfere with ABC's service to its overall viewing audience.

** In our view, once "reasonable access" is granted to one candidate, it will have to be granted to others. Moreover, once time has been granted, the "equal opportunities" provision of Section 315 mnadates that "access" be extended to other legally qualified candidates wholly apart from individual candidate needs (a concept that, as we have noted, is effectively applied only to *one* candidate in the context of this case).

work political programming, but significant amounts of political programming responsive to the needs of local, state and federal candidates in their individual service areas.

CONCLUSION

Even assuming the Presidential campaign is in "full swing", it does not follow that access for a particular candidate must commence at the announcement of his candidacy in order to be "reasonable".

Following the Commission's decision in this case we have had an opportunity to reassess the foregoing factors. That reassessment convinces us anew that ABC's decision to decline to sell the Carter-Mondale Committee a half-hour of time in December during the very early stages of the national political campaign was correct and, in any event, a reasonable exercise of broadcaster discretion.

Respectfully submitted,

AMERICAN BROADCASTING COMPANIES, INC.

By EVERETT H. ERLICK
1330 Avenue of the Americas
New York, New York 10019

JAMES A. MCKENNA, JR.
THOMAS N. FROHOCK
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1150 Seventeenth Street, N.W.
Washington, D.C. 20036

Its Attorneys

November 23, 1979

[Appendix A, Transcript of Open Commission Meeting of November 20, 1979, is reprinted at pages 131-62 of this Joint Appendix; Certificate of Service Omitted in Printing]

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Political Broadcasting Complaint
of the Carter-Mondale Presidential
Committee, Inc.

To: The Commission

MOTION FOR STAY

American Broadcasting Companies, Inc. (ABC), by its attorneys, herewith moves for a stay *pendente lite* of the *Commission's Memorandum Opinion and Order* (Order) released November 21, 1979, holding, *inter alia*, that ABC's refusal to sell one half-hour of prime political time to the Carter-Mondale Committee in December, as distinguished from the first week in January, was a denial of "reasonable access" in violation of Section 312(a)(7) of the Communications Act. In support thereof the following is shown:

1. ABC has today (the first business day following the November 21, 1979 (3:00 p.m.) release of the Commission's Order) filed a petition for reconsideration of the Order, urging the Commission to reverse what we believe to be an unlawful action. ABC urges prompt disposition of this petition. Should the Commission not grant the relief there requested ABC will promptly pursue judicial review of the Order in the United States Court of Appeals pursuant to 47 U.S.C. § 402 (a), and will seek an early court determination.

2. The Commission's decision raises very substantial and important legal issues, generally of first impression. Based upon no more than a statutory requirement of

reasonable access and without Congressional guidance, the Commission has abandoned traditional deference to good faith broadcaster judgments regarding program scheduling and accorded paramount importance to candidates' preferences as to when they shall appear. Moreover, the decision was by 4-3 vote, with two of the majority Commissioners stating at the November 20 open meeting that they viewed the case as extremely close (Transcript of Meeting, pp. 14-15, 31).

3. Further, implementation of the Commission's decision threatens substantial disruption of ABC's program schedule during the month of December, in disregard of ABC's good faith scheduling judgment and, we believe, in disregard of viewer preferences. It is reasonable to expect President Carter's party opponents to invoke equal opportunities rights and other candidates to seek prime political time in December.

4. The Commission's Order directs ABC to advise the Commission by November 26, 1979 of how it intends to fulfill its Section 312(a)(7) responsibilities with respect to the Carter-Mondale Committee's request for prime political time in early December. However, unless the Commission grants ABC's petition for reconsideration by November 26 (in which case this motion would be moot), there would appear insufficient time between now and that date to obtain a resolution of the very substantial and important legal issues.

5. Further, there would appear no need for ABC to take immediate action on the Carter-Mondale Committee's request. President Carter is not a legally qualified candidate (as defined by this Commission). According to press reports, he does not plan to announce his candidacy until the evening of December 4, 1979. Stay of the Commission's November 26 advisement date, coupled with accelerated Commission action on reconsideration and judicial review if necessary, would appear to be

consistent with implementation of the Order should it be sustained.

6. Accordingly, ABC urges the Commission to stay its Order pending action on reconsideration and judicial review if necessary. Further, ABC urges the Commission to act as promptly as possible on petitions for reconsideration, and to cooperate in seeking expedition in the judicial review process.

Respectfully submitted,

AMERICAN BROADCASTING COMPANIES, INC.

By EVERETT H. ERLICK
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Its Attorneys

November 23, 1979

[Certificate of Service Omitted in Printing]

MEDIA
ACCESS
PROJECT

1609 Connecticut Avenue, N.W., Washington, D.C. 20009
(202) 232-1300

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 79-750

In the Matter of

Complaint of the Carter-Mondale
Presidential Committee, Inc.

OPPOSITION OF NATIONAL CITIZENS COMMITTEE FOR BROADCASTING TO NETWORKS' PETITIONS FOR STAY

The National Citizens Committee for Broadcasting (NCCB), by its counsel, the Media Access Project, hereby opposes the petitions filed by the three networks for stay of the Commission's November 21, 1979 order in the above-captioned proceeding.

The traditional criteria for granting of stays, which have been adopted and utilized by this Commission, include three elements: a strong showing of a meritorious appeal, irreparable injury, and the absence of harm to other parties. *See, e.g., Cable TV Pole Attachment Regulations*, 73 FCC2d 1 (1979). We will not here address the first issue, since we believe the Commission's action herein is powerfully supported in the Commission's November 21, 1979 decision.

Notably lacking from any of the petitions for stay is any claim, much less a showing, of irreparable injury.[1] It is NCCB's position that no significant harm will inure to any of the networks by the operation of the Commission's order. In fact, all that is required therein is that the networks state how they will comply with the order. Assuming that CBS, NBC, or ABC would adopt a cooperative position and set out a means of complying with Section 312(a)(7), all that would be involved would be the selection by the network of a time period for the sale to the complainant. Such a sale would result in revenue at the network's normal rate for such broadcasts (NBC estimates the value of a half hour of prime time at $125,000 to $150,000). Indeed, one of the networks, CBS, routinely permits "runovers" for every Sunday football game which continues into the "Sixty Minutes" timeslot.

As the Commission has noted, the real rights in interest here are those of listeners. As the networks must be reminded all too often, it is the right of the public to receive information which is "paramount." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969). The grant of a stay would severely limit the ability of the electorate to be exposed to the most significant kind of political speech imaginable—political campaign rhetoric.

NCCB also notes with disappointment that the networks have apparently declined to follow the Commission's clear suggestion at footnote 34 of the November 21, 1979 order that some sort of negotiated resolution of the matter would be desirable for all parties involved.

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[1] NBC does allege that enforcement of the Order would require "significant dislocation of NBC's programming schedule." Such disruptions are, of course, a way of life for the networks. News events of many kinds, sports programs and many of their own special entertainment programs disrupt schedules. The harm is neither serious nor irreparable, especially where paid programming is involved.

The unfortunate need for government interference in this matter is a function of the refusal of the broadcast industry to adopt a posture which would permit the dispute to be handled privately amongst private citizens. Broadcast licensees cannot be heard to complain about such federal involvement when they have taken a rigid and uncompromising posture that rules out any form of settlement which would not require intrusion by the Commission.

In short, the denial of a stay would cause no harm to any of the networks, and no such harm is even alleged. By contrast, the superior rights of the public to be exposed to information would be severely and irreparably harmed if the stay were granted. And, most importantly, an unnecessary confrontation will apparently occur in the courts because of the unreasonableness of the broadcast industry in failing to accept the need to accommodate conflicting needs by altering an unyielding position.

Respectfully submitted,

/s/ Heidi P. Sanchez
HEIDI P. SANCHEZ

/s/ Andrew Jay Schwartzman
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November 23, 1979

[Certificate of Service Omitted]

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Complaint of

Carter-Mondale Presidential
Committee, Inc.

against

The ABC, CBS and NBC Television
Networks

OPPOSITION TO PETITIONS FOR STAY

The Carter-Mondale Presidential Committee, Inc. (hereinafter "Committee"), strenuously opposes the petition of CBS, Inc. to stay the Commission's Order, FCC 79-750, released November 21, 1979, finding that the three television national networks have failed to comply with Section 312(a)(7) of the Communications Act and directing each network to advise the Commission as to how it intends to fulfill its obligations on or before November 26, 1979.*

No basis or justification whatsoever has been set forth by CBS to support the requested stay. Essentially, all that has been argued is that the Commission's Order "raises substantial questions" of law and that CBS will undertake to pursue an appeal as expeditiously as possible. These bare allegations fall woefully short of the standards followed by this Commission for granting a stay as set forth in *Virginia Petroleum Jobbers Association* v. *FPC*, 259 F.2d 921 (D.C. Cir. 1958).

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* This also responds to requests for stay filed by NBC and ABC today which the Committee has just received. These appear to make essentially the same arguments and are similarly lacking in support.

First, no showing has been made or even attempted that CBS is likely to prevail on the merits of its appeal. Second, CBS has not even alleged that it will suffer irreparable injury in the absence of a stay. Third, as shown below and in the attached affidavit, the issuance of a stay in this case would substantially harm the interests of the complaining party in the proceeding. Fourth, CBS has made no showing that the public interest would be served by a stay. To the contrary, the public interest requires that the Commission's decision be promptly implemented. CBS apparently does not appreciate that its interests as a private litigant in this matter ". . . must give way to the realization of public purposes." *Virginia Petroleum Jobbers Association* v. *FPC*, *supra*, 295 F.2d at 925.

If a stay is granted, the interests of the Committee will be substantially harmed. In all likelihood, the relief accorded by the Commission will be effectively mooted. The Committee had sought (and still seeks) to purchase a half-hour on one of the three national television networks on the evening of either December 4, 5, 6 or 7, 1979. December 4, the first day requested, is now ten days away. As reflected in the attached affidavit, substantial advance planning and arrangements are necessary to utilize the time period effectively in accord with the Committee's original plans which were described in its October request to the networks and subsequent filings. The intended "use" for which the time has been sought is planned to coincide as close as possible with the President's formal announcement of his candidacy for re-election on December 4, 1979. Due to various considerations, including pertinent requirements of law concerning campaign activities and filing deadlines, this announcement cannot be postponed until a later date. Therefore, unless the Commission's order is promptly implemented, a Presidential candidate's access rights un-

der the Communications Act will have been effectively frustrated with no satisfactory substitute available at a later date.

The networks apparently would have a Presidential candidate completely alter his fundamental campaign strategy and timing to conform to their desires and selling policies. From the outset of this matter, the Committee has endeavored to pursue its request with the needs of the networks in mind and to give the networks maximum flexibility in responding so as to not disrupt their normal commercial operations.* In return, we have been met by an attitude of indifference to our needs and a pattern of refusals, both before and after the Commission's order, to enter into good faith negotiations, as urged by the Commission. *Order*, ¶ 49. If this posture of willful defiance continues past November 26th, it will be incumbent on the Commission (rather than staying its order) to undertake enforcement measures under Section 312.

CBS and the other networks, had they wanted to, previously have had ample opportunity to litigate the constitutionality and/or application of Section 312(a)(7). The Commission's Order essentially does no more than apply the enforcement policies which the Commission announced it would follow in its 1978 Policy Statement, *Commission Policy on Enforcing Section 312(a)(7) of the Communications Act*, 68 FCC 2d 1079 (1978). The networks participated fully in the proceeding leading to

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* See *Order*, ¶ 44. The Committee sought to purchase one of the networks' normal program time units and, by requesting availabilities over a four day period, gave the networks considerable scheduling latitude in responding. Moreover, the Committee realized that the requested December period would be outside the networks' November audience measurement periods and therefore could not possibly prejudice the networks from this standpoint.

the adoption of this Policy Statement.* They had every opportunity at that point to appeal on the purported "substantial questions" of law and constitutionality raised by the order. They chose not to do so and should not now be permitted to frustrate a Presidential candidate's statutory rights and an Order of this Commission under the pretext of seeking judicial review of a novel and unprecedented action.

For these reasons, the requests for stay should be immediately denied and the three networks directed to comply with the Commission's order on or before November 26, 1979.

Respectfully submitted,

/s/ Timothy G. Smith
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Carter-Mondale Presidential
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November 23, 1979

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* CBS filed comments in B.C. Docket 78-102 on Commission Policy in enforcing § 312(a)(7). It was aware of the FCC's practice to exercise jurisdiction over the networks in political broadcasting matters, but did not raise any jurisdictional objection at that time. Moreover, while it did raise First Amendment questions, it did not seek judicial review of the Commission's Report and Order. ABC and NBC also participated in the proceeding.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

IN RE: COMPLAINT OF THE
CARTER-MONDALE PRESIDENTIAL COMMITTEE, INC.

AFFIDAVIT OF GERALD M. RAFSHOON

CITY OF WASHINGTON)
) ss.:
DISTRICT OF COLUMBIA)

GERALD M. RAFSHOON, being duly sworn, does depose and say:

1. I am President of Rafshoon Communications, which is under contract to the Carter-Mondale Presidential Committee, Inc. ("CMPC") for production and placement of media advertising in connection with the 1980 primary elections and caucuses.

2. In consultation with CMPC, I have directed the preparation of a documentary film on the President and his Administration to be used by the President in conjunction with his announcement concerning his candidacy in the first week of December 1979. This film has been prepared at considerable effort and expense to CMPC and is designed to be the principal means to inaugurate the President's campaign.

3. From the outset of this matter the CMPC and I have attempted to cooperate with the networks and to take into account their needs and concerns. Thus, we requested time for our program almost two months before it was to be aired. In order to afford additional programming flexibility for the networks, we also gave each network the option of running the program in any one of five half-hour slots on any one of four dates. To minimize the chances for any competitive or financial

harm to the networks, we did not ask for the program to be shown until the first week in December, which is after the period in which network ratings are determined.

4. Also in an attempt to reach a voluntary and cooperative resolution of this matter, I asked counsel for the CMPC immediately following the Commission action on our complaint on Tuesday, November 20, 1979, to open a dialogue with counsel to the networks as to how and when compliance with the Commission's decision might best be achieved. I am advised that counsel for each of the networks informed Mr. John D. Lane, counsel to the CMPC, that they did not wish to discuss any such actions until they had reviewed the Commission's formal order.

5. Also on Tuesday afternoon, November 20, 1979, I independently contacted sales representatives of each of the networks to seek to open discussions concerning placement of our program in light of the Commission's action. Mr. Charles Allen of ABC responded that he had to await advice of counsel and review of the Commission's written order, and thus there was no reason to discuss any program placement. Mr. Raymond Dillon of CBS responded that no such discussion was necessary since CBS intended to contest the Commission's decision. Mr. Jo Iaricci of NBC responded by stating that he would have to check to see what times were available on our requested dates and that he would have to check with counsel, but that he would get back to me. Mr. Iaricci, however, has not responded further.

6. On Wednesday, November 21, 1979, after the Commission issued its order, I sent telegrams to the presidents of each of the networks inviting them or a designee to attend meetings in Washington on Friday, November 23, 1979, to discuss sale of the half-hour in question and compliance with the Commission's order. To ensure that the messages would be received, I instructed my assist-

ant, Becky Hendrix, to call the offices of each of the addressees. After she was informed in each case that the networks would be closed until Monday morning, November 26, 1979, Ms. Hendrix, at my suggestion, read the contents of the telegram to the secretaries of each addressee. The same afternoon, Mr. Everett Ehrlich of ABC responded by telephone that there would be no use having a meeting since ABC intended to contest the Commission's order. Also on Wednesday afternoon, Mr. Gene Mader of CBS responded that CBS would not participate at such a meeting. On Friday morning, November 23, 1979, Mr. Howard Monderer of NBC responded to the same effect. Each of these responses were made notwithstanding the Commission's suggestion in its Memorandum and Order (paragraph 49 and footnote 34, thereto, at 23) that such meetings and good faith negotiations should occur. (See Exhibit B.)

7. Based on the above, it is obvious that immediate enforcement of the Commission's order is required if the CMPC is to have any meaningful relief in this case. Further delay and refusal to obey the Commission's instructions will moot the CMPC's case and abrogate its reasonable access rights in complete definance of the Commission's decision on the merits.

8. This result would cause serious and irreparable harm to the President's re-election campaign. As previously noted, the purpose of the program in question is to inaugurate, and set the tone for, the official and formally announced portion of the President's campaign by describing the record of his Administration and the case for a second term in a thoughtful and complete manner. Thus, to achieve its central purpose, it must appear as close as possible to the President's planned announcement of candidacy on December 4, 1979. At least one week's lead time is required to promote this program properly in order to inform the public of its showing and to assure an adequate viewing audience.

9. Furthermore, the date for the President's announcement cannot be postponed without great disruption and political and financial harm to his campaign. The December 4th announcement date has been set for nearly 10 weeks, and a great deal of fundraising and campaign activity has been planned around it.*

10. I am personally aware that CMPC political organizers, volunteers, fundraising committees, and other workers are active in more than 25 states to raise necessary contributions, to circulate nominating petitions to place the President on the ballot, to recruit delegate candidates and form delegate slates, and to perform many other basic campaign activities. For example, the CMPC has maintained a headquarters in Concord, New Hampshire since May and now has four offices and several paid staff members in the state. There is a New Hampshire campaign steering committee of over 500 persons. The CMPC is currently passing petitions to put the President's name on the New Hampshire primary ballot. In Iowa, the CMPC has an office in Des Moines with a staff of over ten persons and a state steering committee of more than 150 persons. In Florida, the CMPC maintains offices in Orlando, Miami, and Tallahassee, and mounted a successful effort in the October 13th county caucus and the November 18th State Democratic Convention straw ballot there. In Minnesota, the CMPC has an office, several employees and a steering

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* Should the events in Iran or elsewhere preclude the President's personal involvement in normal campaign activity during this period, it would make all the more important that his campaign continue through other means. Purchased television time under the circumstances would be the only effective method to communicate his case for reelection directly to the American people. In any case, for the reasons set forth at paragraph 11, *infra*, the President will take all necessary steps, including a public announcement of candidacy, to become a legally qualified candidate before airing of the program.

committee of over 1,500 persons. In Illinois, the CMPC has offices in Springfield and Chicago, with several paid employees who are currently supervising the passing of petitions required to place the President's name on the March 18, 1980 primary ballot there. In New York, the CMPC has an office in New York City with several employees and has done initial organizational work in all parts of the state. In Georgia, the CMPC has operated a Shoutheast regional office since the spring with two full-time employees and numerous volunteers. A major fundraising event has been held in Atlanta. In Oklahoma and Texas, there is a full-time coordinator, large steering committees, and active fundraising events. In California, a steering committee was announced in July; there is also a state coordinator, a small staff, a fundraising committee, and numerous volunteers. Additional such information on other states can be provided, if necessary. Finally, the First Lady, the Vice President, and other representatives of the President have made numerous campaign speeches and other CMPC-sponsored appearances in these and other states over the last several months.

11. Further, it is important to note that December filing requirements in New Hampshire and Illinois preclude any substantial postponement of the President's formal announcement of candidacy.

12. Moreover, for more than six weeks, the CMPC has been recruiting persons from all over the country to hold small-donor fundraisers in their homes during the week of the President's announcement. The key to the planning and promotion of these events is the opportunity to watch the half-hour program as the focal point and highlight of each fundraiser.* CMPC has been able to

* While the CMPC was able in early October, when it first approached the networks, to provide a range of dates (December 4, 5, 6, and 7) from which the most convenient could be chosen, it now

recruit over 1,500 hosts and hostesses for such events. We anticipate having 2,000 homes participating in these events by December 4th. If, however, relief is delayed, it would be impossible to implement this program successfully and the CMPC could lose as much as $1,000,000 in small donations at this critical period in the campaign.

13. There are no feasible alternatives to purchasing time for the half-hour program on one of the three respondent networks on, or as close as possible to, the date of the President's announcement as originally requested. Delaying the broadcast will defeat its whole purpose. Attempting at this point to purchase comparable time on the hundreds of individual stations required to duplicate network coverage would be prohibitively expensive and logistically impractical, if not completely impossible.

14. Finally, I am aware that only two other Presidential Candidates, Ronald Reagan and John Connolly, to date in this campaign, have sought to purchase half-hours of network time for paid political programs.* I have been informed that Mr. Reagan's campaign no longer desires to purchase such time this year. I am

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needs a definite date in order that the hundreds of hosts and hostesses of the small-donor fundraising parties described above will have adequate notice to invite potential contributors. Accordingly, after failing to obtain a stipulation from any of the networks of a specific date on which the program would be shown if the CMPC prevailed before the Commission, the CMPC on November 21st informed these hosts and hostesses that it would make every effort to have the program shown on Tuesday, December 4th, the date of the President's announcement.

* It should also be noted that President Carter's campaign is the only campaign among the contenders for the Democratic Presidential nomination to have qualified for federal matching funds. Therefore, the networks, as a practical matter, are unlikely to face Section 315 "equal opportunity" requests from either the Kennedy or Brown campaigns.

aware that Mr. Connolly's campaign does intend to continue to seek such time. (See *New York Times* article of November 23, 1979, attached as Exhibit A.) Thus, it appears that only one other Presidential candidate besides President Carter seeks to purchase such time, and therefore that the networks' "multiplicity of candidates" and "programming disruption" arguments are, at best, exaggerated and speculative.

15. The CMPC has been as cooperative as possible in seeking to accommodate the legitimate concerns of the networks in connection with its request for time and with this proceeding. Unfortunately, it is now clear that the networks do not intend to comply with either the CMPC's request or the Commission's order and instructions. It is also clear that, absent further prompt Commission action, the President's reelection campaign will be seriously and irreparably damaged by the networks' refusal to sell the requested time.

/s/ Gerald M. Rafshoon
GERALD M. RAFSHOON

Subscribed and sworn to, before me,
this 23rd day of November, 1979.

/s/ [Illegible]
Notary Public

My Commission Expires April 30, 19**

EXHIBIT A

NEW YORK TIMES, *Friday, November 23, 1979*

ACCESS RULES FOR NETWORKS

Carter's Victory Raising Questions on Adequacy

BY ERNEST HOLSENDOLPH

Special to The New York Times

WASHINGTON, Nov. 22—Hardly anyone feels comfortable with the role of the Federal Government in deciding who shall have access to the airwaves, but while Congress is re-examining the rules, there seems to be no quick or obvious alternative.

News Analysis

The application of the rules has tripped politicians on occasion, or come close to doing so, as in the narrow 4-to-3 Federal Communications Commission victory for President Carter on Tuesday granting him network time next month to announce his candidacy for re-election. At other times, corporations have been blocked in presenting messages, even though they were willing to pay to get them broadcast.

Much is at stake for political candidates. The increasing power of radio and especially television broadcasting to make candidates recognized and electable, and changing patterns in Presidential electoral politics, which have made state primaries more pivotal in campaigns for party nominations, have put increased pressure on the creaky rules for governing access to the air.

The rules that apply to these access questions include the fairness doctrine, which requires broadcasters taking up important community issues to see that all sides are treated; "reasonable access" for qualified political office seekers, and equal time for all qualified candidates for an office if time has been made available for one.

In the words of Representative Lionel Van Deerlin, chairman of the House Communications Subcommittee, it is some * * *

'Reasonable Access'

On Tuesday the Carter-Mondale Presidential Committee, under the rule that says legally qualified candidates are entitled to "reasonable access" to the airwaves, persuaded the Federal Communications Commission to declare the networks unreasonable in denying President Carter 30 minutes of prime time next month. The ruling puts into effect a requirement for equal time for political opponents, and Gov. John B. Connally's representative here said the Republican Presidential aspirant would also try to obtain network time.

Meanwhile, Gov. Edmund G. Brown Jr. has been excluded from a debate between President Carter and Senator Edward M. Kennedy on television in January on the legal ground that the appearances are sponsored by a third party, The Des Moines Register, and are thus exempt from equal time requirements.

While broadcasters, under certain circumstances, are expected to operate like newspapers and aggressively seek news and information, rules sometimes compel them to behave otherwise.

For instance, both the Kaiser Aluminum and the Mobil Oil Corporations have tried to present paid messages on the air about various issues and have been turned down because the broadcasters fear that they will be compelled to allot time for responses as an obligation

under the fairness doctrine. Mobil has been rejected, even though the company proposes to pay for time of parties that demand equal time.

Doubts About Doctrine

In a talk in Houston to broadcasters Tuesday, Mr. Van Deerlin wondered aloud how well the fairness doctrine, equal time and reasonable access requirements could be serving the public "when a fear of triggering equal time causes the three networks to refuse time to the Carter-Mondale campaign organization; or when the exemption for debates sponsored by a third party leaves a Jerry Brown without redress; or when Ronald Reagan has to beg for time from scattered independents because he can't get it from networks?"

Since the appearance of one major candidate not only opens the door but also invites opponents to come in and ask for time, the CBS, NBC and ABC networks * * *

Tyrone Brown, an F.C.C. commissioner who once served as the general counsel for Post Newsweek broadcast stations here, recalled Tuesday that harried program directors would come in and ask him in the spring: "Is it time for the campaign to start now?" This meant, he said, was it appropriate to take the first advertisement?

Mr. Brown, who voted to support the Carter petition, said he felt uncomfortable in that role. However, a high official for ABC, voicing another concern in an interview Tuesday, said:

"We're concerned when any candidate, whenever he chooses, and however early, can come in and demand to be satisfied with access and length of time."

Prime Time Pre-emption

For the broadcasters, according to their testimony, opening the gates, especially in a crowded campaign such as the upcoming contests for the Republican and Democratic nominations, could mean pre-emption of prime time by a parade of candidates and financial losses because political advertisers do not pay sums equal to the advertising time afforded by even a modestly popular situation comedy.

Despite some problems, the commission chairman, Charles D. Ferris, said today that he would "leave the rules just as they are."

He said that he agreed with Mr. Van Deerlin that "in a perfect world, where there is enough competition" there might not be a need for the access rules and requirements.

"But right now there is no other way to deal with the economic motivations of the broadcasters, the rights and needs of the various political candidates or the public's interest in a full flow of information," Mr. Ferris said.

Meanwhile, Congress is examining the impact of the current rules and could provide some modification in the communications legislation that may be presented soon, sources on Mr. Deerlin's committee * * *

EXHIBIT B

(Dictated to Western Union operator 229
11/21/79 2:30 p.m.)

RAFSHOON
COMMUNICATIONS

[SEAL]

1775 Pennsylvania Avenue NW
Suite 1250
Washington, D.C. 20006
202/293-5454

Mr. Fred Silverman
President
NBC, Inc.
30 Rockefeller Plaza
New York, New York 10020

Dear Mr. Silverman:

Could you—or your designee authorized to speak for NBC—please attend a meeting in my office at 1775 Pennsylvania Avenue, NW, Suite 1250, Washington, D.C. at 12:00 noon Friday, November 23, 1979, to discuss sale of half-hour to Carter/Mondale Committee to comply with FCC decision.

Sincerely,

GERALD M. RAFSHOON
President

(Dictated to Ann in Silverman's ofc. 212/664-4555)

RAFSHOON
COMMUNICATIONS [SEAL]

1775 Pennsylvania Avenue NW
Suite 1250
Washington, D.C. 20006
202/293-5454

Mr. Elton Rule
President
ABC
1330 Avenue of the Americas
New York, New York 10019

Dear Mr. Rule:

Could you—or your designee authorized to speak for ABC—please attend a meeting in my office at 1775 Pennsylvania Avenue, NW, Suite 1250, Washington, D.C. at 10:00 a.m. Friday, November 23, 1979, to discuss sale of half-hour to Carter/Mondale Committee to comply with FCC decision.

Sincerely,

GERALD M. RAFSHOON
President

(Dictated to Maureen Hayden, Rule's ofc. 212/887-7777)

RAFSHOON
COMMUNICATIONS

[SEAL]

1775 Pennsylvania Avenue NW
Suite 1250
Washington, D.C. 20006
202/293-5454

Mr. John Backe
President CBS, Inc.
51 West 52nd Street
New York, New York 10019

Dear Mr. Backe:

Could you—or your designee authorized to speak for CBS—please attend a meeting in my office at 1775 Pennsylvania Avenue, NW, Suite 1250, Washington, D.C. at 11:00 a.m. Friday, November 23, 1979, to discuss sale of half-hour to Carter/Mondale Committee to comply with FCC decision.

Sincerely,

GERALD M. RAFSHOON
President

(Dictated to Joan Murphy, Backe's ofc. 212/975-5152)

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Complaint of:

Carter-Mondale Presidential Committee, Inc.

Against

The ABC, CBS and NBC Television Networks

To: The Commission

OPPOSITION TO PETITIONS AND REQUESTS FOR RECONSIDERATION

The Carter-Mondale Presidential Committee, Inc. ("Committee") opposes the petitions and requests for reconsideration of the Commission's Memorandum Opinion and Order ("MO&O") in the above matter,* filed by each of the three national networks.

The networks' responses to the Commission's order of November 20th evidence a disturbing disregard for their obligations both under Section 312(a)(7) and as the most important and powerful group of licensees under the Commission's jurisdiction. Rather than attempt even to discuss compliance with a lawful and reasonable order of this Commission (which should have been unnecessary in the first place), the networks' responses amount to the "stonewalling" not only of a Presidential candidate, but also of this Commission and the public interest.

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* FCC 79-750, released November 21, 1979. The arguments raised by the networks are essentially identical and thus may be answered in one pleading. Inasmuch as the NBC and ABC requests were not received by the Committee until the afternoon of November 23rd at approximately 1:00 p.m. and 4:30 p.m. respectively, all references will be to the CBS petition unless otherwise noted.

Since the Commission's action on Tuesday afternoon, the networks have:

(A) refused to engage in any substantive discussion with the Committee to resolve the matter (in complete disregard of the Commission's urging); *

(B) refused thus far to comply with the Commission's instructions to advise the Commission no later than November 26th as to how they intend to fulfill their Section 312(a)(7) obligations; and

(C) pursued a course of action which can only serve to frustrate the relief granted and effectively deprive a Presidential candidate of his statutory rights.

Their actions collectively constitute a blatant challenge to the Commission's mandate which, if permitted to continue, will give the Commission no choice but to exercise the full powers at its disposal under the Act to insure the integrity of its Orders.

As hereinafter shown, the networks have raised no new arguments or facts that require the Commission to revisit, let alone reverse, its November 20th Order. The networks completely exaggerate both the so-called unprecedented nature of the Order and its impact on their operations. Notwithstanding their characterizations, the moderate action taken was clearly envisioned by, and is in accord with, the Commission's 1978 *Policy Statement on Enforcing Section 312(a)(7)*, 68 FCC2d 1079 (1978). The networks participated fully in the proceedings leading to the adoption of this *Policy Statement* and had

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* *MC &O*, p. 23, N. 34. This course of events is set forth in the affidavit attached to the Committee's Opposition to Petitions for Stay, filed yesterday.

every opportunity to appeal at that time without prejudicing and frustrating the rights of a Presidential candidate during his campaign.

Moreover, again notwithstanding their characterizations, the commission's order gives due and, if anything, excessive deference to the traditional licensee discretion test applied by the Commission in political broadcasting matters.* The networks confuse the responsible exercise of their discretion in meeting the requests of Federal candidates under Section 312(a)(7) with blind adherence to predetermined and arbitrary policies. Such policies may have been acceptable prior to the enactment of the Section 312(a)(7) but now must give way to the realization of valid public purposes. If Section 312(a)(7) is to have any real meaning, the Order of November 20th must be strongly reaffirmed and enforced by the Commission.

I. *The Requests Fail to Set Forth Any Basis For Reconsideration*

CBS' Petition and the other requests do not comply with the requirements of Section 1.106 of the rules, nor do they even attempt to demonstrate compliance with that rule. Nor have they brought any new matters to the attention of the Commission. The petitions are essentially *ex post facto* rationalizations of arbitrary, prior decisions, fashioned to meet points raised during the Commission's November 20 open meeting and the *MO&O*.

The Networks' claims to have considered the needs of the candidate are clearly unsupportable in light of the facts already in the record. It is obvious from CBS' own October 17, 1979 letter of rejection that it did not

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* This test was modified by the enactment of Section 312(a)(7) insofar as Federal candidates are concerned to provide for the needs of the candidate as well as the broadcaster. See Committee Reply, pp. 7-9.

consider the Committee's and President Carter's needs, but only its own concerns. (Committee Complaint, Exhibit B pp. 3-4.) As found in the MO&O, CBS could not have objectively considered the Committee's needs because of its absolute and predetermined policy, adopted no later than September, 1979, not to sell half-hour programs and to offer only five-minute programs to candidates. No amount of rhetoric at this time can change that fact. Moreover, its five-minute counter-offer fell completely outside the four day time span requested by the Committee and was therefore completely unresponsive for this additional reason.

Similarly, ABC's and NBC's claims are transparent. How could ABC really have considered the needs of the candidate when its policy as of the Committee's initial request did not even provide for the sale of time? While ABC's policy has shifted, it should be emphasized that it still has *not* offered to sell any time to the Committee.

Even now, the networks' refusals are not responsive to the factors described in the Commission's 1978 *Policy Statement on Enforcing Section 312(a)(7)* and its Order of November 21st; rather, they are based on irrelevancies such as the amount of news coverage normally given an incumbent and on insistent restatements of the networks' unique ability and unilateral right to determine viewer preferences and the time when campaigns should begin. Thus, ABC, for example, seeks to support its Petition for Reconsideration with such extra-statutory logic as:

> . . . the public would not respond favorably to the program disruption associated with a parade of full-length paid political programs at this early, formative stage of the campaign. (Petition at 10); and
>
> Even assuming the Presidential campaign is in "full swing," it does not follow that access for a particu-

lar candidate must commence at the announcement of his candidacy . . . (Petition at 11).

II. *The Commission's Decision Properly Considered All Relevant Factors and Reached the Right Conclusion*

CBS claims that its refusal to sell the Committee a prime-time half-hour between December 4 and 7 was an "editorial decision" * of the type supported by the Supreme Court in *CBS* v. *DNC*, 412 U.S. 94 (1973). This case has no direct bearing on the application of Section 312(a)(7). The Supreme Court therein dealt with the application of the Fairness Doctrine to editorial messages and the rights of broadcasters to present the discussion of public interest issues. That is clearly different from the application of a specific statute enacted by Congress (with knowledge of the then-pending *CBS-DNC* controversy) granting Federal candidates the right, *inter alia*, to purchase a reasonable amount of time to further their candidacies.

Nor is the brief footnote in the *DNC* case relied on by CBS alluding to this Congressional enactment significant. The FCC, which has the initial and primary responsibility of interpreting the Communications Act, already has specifically determined that Section 312(a)(7) is *not* simply a codification of prior law. In a thorough review and interpretation of the provision just last year, the Commission said that the provision imposed a *different* and *additional* obligation on broadcasters toward Federal candidates. *Enforcing Section 312(a)(7), supra.*

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* If true, we find it surprising that CBS' policies (as well as those of the other two networks) permit such a decision to be handled by advertising sales representatives. See Attachment B to Complaint, p. 4.

CBS contends that Congress expressed a desire to limit the length of political campaigns. In fact, Congress rejected a proposal to limit campaigns. *Enforcing Section 312(a)(7), supra,* 68 FCC 2d at 1081. Furthermore, as the Commission plainly concluded, the Presidential campaign has begun and is in full swing. The time frame of previous election seasons is not relevant to this campaign, since it has already begun. Moreover, ABC's concern that the Commission has too deeply involved itself in determining when a campaign begins is similarly specious. The Commission was most careful to avoid such involvement, rather basing its decision on a thorough analysis of the objective, extrinsic facts before it.

CBS places great reliance on *Letter to Paul A. Talmey,* 31 RR2d 1309 (1974). That staff opinion which predates the Commission's 1978 Policy Statement is not on point. The licensee in that case, unlike the networks, *did* agree to sell the candidate a half-hour program. The candidates' complaint concerned the precise time of the broadcast whereas the Committee has given CBS and the other networks considerable leeway—a choice of twenty half-hours per network.

Next, CBS reraises the contention that the FCC lacks jurisdiction to apply Section 312 to network operations, even though it was fully considered by the Commission in its decision. The logical conclusion to be drawn from CBS' position is that, even though the networks are licensees and act as agents for their affiliates (MO&O, ¶ 22), the networks would never have access obligations to Presidential candidates. Thus, candidates for the Presidency—the only nationally elected office—could only deal with individual stations. This would not only be costly, burdensome and contrary to the intent of Congress to control the costs of political campaigns, but also it would drastically curtail the process of informing the electorate, again contrary to the intent of Congress.

The networks are the most influential and powerful broadcast organizations in this country, whose policies and activities set the tone for the entire industry. Before the adoption of section 312(a)(7), other political broadcasting requirements had been applied to the networks, and it is inconceivable that Congress would have exempted them from access obligations when it adopted Section 312(a)(7). Furthermore, as the Commission notes, networks always have been included in the definition of the term broadcasting station. *MO&O*, p. 9. Finally, the FCC has specific and direct jurisdiction over the activity of networking under Section 303(i) of the Communications Act which authorizes the Commission to regulate "chain broadcasting."

CBS also reraises the First Amendment argument about the constitutionality of Section 312(a)(7), even though it, too, has been considered by the Commission. E.g., *MO&O*, p. 15. This argument fails to appreciate the fundamental fact that it is the public's First Amendment rights that are paramount. Section 312(a)(7) advances the right of candidates to inform the public, and more importantly, the primary right of the electorate to be informed. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969).

Finally, the networks again seek to demonstrate the reasonableness of their actions through rearguing such points as the "multiplicity of candidates" and "program disruption" defenses.* Again, these alleged considera-

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* The networks' continued suggestions that the President may not be a legally qualified candidate at the time of the broadcast are not well taken. As further described in the affidavit of Gerald M. Rafshoon appended to the Committee's Stay Opposition, President Carter, through his authorized campaign committee, clearly has made a substantial showing of *bona fide* candidacy in more than ten states. Moreover, as has been widely reported in the media, the White House has announced that the President intends to formally declare his candidacy on December 4, 1979, and the time requested is expressly designed to follow *after* his announcement.

tions are essentially restatements of arguments made in their responses and have already been fully considered and rejected by the Commission. They are not grounds for reconsideration.

CONCLUSION

In their Petitions, the networks have raised nothing new of any significance. Their essential arguments have already been rejected by the Commission. What the present situation comes down to is as follows. In early October, the Committee sought to purchase one thirty-minute time period from one of the networks between December 4th and 7th. The Committee was totally rebuffed. Now over six weeks later, the situation remains the same: total unwillingness by the networks to consider the Committee's needs or even to enter into discussions with the Committee to try to resolve the matter. In effect, the networks stand on the brink of defiance of the Commis-

sion. If the Committee is to have any hope of securing effective relief, this situation must be corrected at once.

Respectfully submitted,

/s/ Timothy G. Smith
TIMOTHY G. SMITH
General Counsel
CARTER-MONDALE PRESIDENTIAL
COMMITTEE, INC.
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Of Counsel:

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Harold K. McCombs, Jr.
1822 Jefferson Place, N.W.
Washington, D.C. 20036

November 24, 1979
12:30 p.m.

[Certificate of Service Omitted in Printing]

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re:

Complaint of the
Carter-Mondale Presidential
Committee, Inc.

CBS REPLY TO OPPOSITION TO PETITIONS FOR STAY

We believe that the Opposition to Petitions for Stay filed by the Carter-Mondale Presidential Committee, Inc. (the "Committee") fails to show that a stay should not be granted pending reconsideration and judicial review. We briefly address here the question whether a stay should be granted pending judicial review if reconsideration is denied.

1. In view of the equities (see below) a stay pending judicial review should be granted if substantial questions are presented. *Ohio Oil Co.* v. *Conway*, 279 U.S. 813 (1929); *Washington Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.*, 559 F.2d 841, 843 (1977); *Charlie's Girls, Inc.* v. *Revlon, Inc.*, 483 F.2d 953, 954 (2d Cir. 1973).

2. It cannot be disputed that this case presents substantial questions. The decision was rendered by a bare 4 to 3 majority of the Commission, and three of the members of the Commission majority indicated in their separate concurring opinions that this is a particularly close case. Separate Statement of Charles D. Ferris, Chairman and Commissioner Joseph R. Fogarty; Statement of FCC Commissioner James H. Quello. See also Transcript of Public Meeting, pp. 14-15, 31.

3. Moreover, even if a more stringent standard were applied, CBS believes that it has established a strong likelihood of prevailing on the merits. For example, the Commission has erroneously declined to decide the substantial constitutional issues and in suggesting that Section 312(a)(7) was designed to do more than "codify" pre-existing Commission requirements under the public interest standard, the Commission has rendered a decision directly contrary to the Supreme Court's finding in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 113-14 n.12 (1973) that Section 312(a)(7) "essentially codified the Commission's prior interpretation. . . ."

4. The Committee has failed to establish that it would suffer significant injury if a stay were granted pending a prompt judicial review proceeding. Most of its showing is devoted to alleging that injury would occur if President Carter's announcement of his candidacy for reelection were delayed. No suggestion has been made that that announcement should be delayed. The Committee argues primarily that "substantial advance planning and arrangements have been necessary to utilize the time period effectively . . .," *id.* at 2. The Committee appears to argue that "at least one week's lead time is required to promote this program properly in order to inform the public of its showing and to ensure an adequate viewing audience." Affidavit attached to Opposition, p. 4. The Committee fails to establish why a few days delay in the exhibition of this program, or in the accompanying "home viewing parties" would cause it irreparable injury. In any event, if the stay is granted, there is reason to believe that the case could be briefed, argued and decided in the Court of Appeals approximately one week in advance of the last broadcast date selected by the Committee. (This could be accomplished if the case were briefed, argued and decided during this week.)

5. CBS would suffer irreparable injury, as would the public interest, if a stay were not granted. The loss of First Amendment rights is irremedial,* and the public interest would clearly be injured if CBS were compelled to sell program time to the Committee when the Congressional purpose required deference to CBS' editorial judgment. Moreover, if a stay were not granted pending judicial review; the program time was purchased by the Committee, and it was later determined that the Committee was not entitled to time, other candidates seeking to purchase time on the CBS Television Network pursuant to Section 312(a)(7) would be disadvantaged vis-a-vis President Carter.

6. If the Commission is concerned that it should not grant an open-ended stay, we suggest that a stay be granted for a period of one week from today, to enable the Court of Appeals to determine whether the stay should be continued thereafter if the merits have not been resolved. This would enable the Court of Appeals

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* *See Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury").

to consider both the case on the merits and the stay request in a more orderly fashion.

Respectfully submitted,

CBS INC.
By

/s/ Ralph E. Goldberg
RALPH E. GOLDBERG
51 W. 52 Street
New York, New York 10019

/s/ Joseph DeFranco
JOSEPH DEFRANCO
1800 M Street, N.W.
Washington, D.C. 20036

/s/ Mark W. Johnson
MARK W. JOHNSON
1800 M Street, N.W.
Washington, D.C. 20036

Its Attorneys

Of Counsel

Wilmer & Pickering
1666 K Street, N.W.
Washington, D.C. 20006

November 26, 1979

[Certificate of Service Omitted in Printing]

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 79-772

15192

In re Complaint of

Carter-Mondale Presidential Committee, Inc.

against

The ABC, CBS & NBC Television Networks.

MEMORANDUM OPINION AND ORDER

Adopted: November 26, 1979;

Released: November 26, 1979

By the Commission: Commissioners Lee and Washburn concurring; Commissioner Jones absent.

1. The Commission has before it petitions for reconsideration and stay of its *Memorandum Opinion and Order*, FCC 79-750, released on November 21, 1979, filed by CBS, ABC, and NBC, and various responsive pleadings. Because of the importance of this matter and the issues presented, the Commission has scheduled a special meeting for November 28, 1979, and intends to adopt a decision at that time. Accordingly, we *sua sponte* extend the date for compliance with the requirement set forth in paragraph 50 of the Order released November 21, 1979. Each network is instructed to advise the Commission on or before 5:30 PM, November 29, 1979, as to how it intends to fulfill its Section 312(a)(7) obligations.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO
Secretary

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Political Broadcasting Complaint of the
Carter-Mondale Presidential Committee, Inc.

PETITION FOR RECONSIDERATION AND COMMENTS IN SUPPORT OF MOTIONS FOR STAY

The National Association of Broadcasters (hereinafter NAB),[1] a party to this proceeding,[2] hereby submits its Petition for Reconsideration and Comments in Support of Motions for Stay, filed by the three networks in the above-captioned proceeding. The three networks have also filed petitions for reconsideration.

NAB, having reviewed the Commission's Memorandum Opinion and Order (FCC 79-750, —— FCC 2d —— (1979) in the above-captioned proceeding, agrees with petitioners-movants that the Commission's decision (1) sets forth a far-reaching set of new policies—policies which remove substantial discretion from broadcast licensees and (2) establishes a dangerous system of gov-

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[1] NAB is a nonprofit incorporated association of radio and television broadcast stations and networks. As of November 20, 1979, NAB's membership included 616 television broadcast stations, 4,609 radio broadcast stations and all the major commercial broadcast networks.

[2] NAB filed Comments on November 8, 1979, urging the Commission to find that the refusal by the three networks to sell the Carter-Mondale Presidential Committee a half-hour of prime time is neither unreasonable under Section 312(a)(7) of the Communications Act nor an abuse of the journalistic discretion properly vested in their stations as licensees. NAB submitted these Comments, as an *amicus curiae*, to underscore the interest of broadcast licensees in this proceeding.

ernmental second-guessing of broadcasters' good faith judgments as to reasonable access. It is NAB's position that this new approach to political broadcasting was not contemplated by Congress when it enacted Section 312 (a) (7) of the Communications Act and that this new approach is, in fact, in direct conflict with that statutory provision. Moreover, the Commission's decision underscores the conflict of this statute with the First Amendment interest in insulating from governmental second-guessing broadcasters' discretion as to programming.

In its Memorandum Opinion and Order, finding that the networks had acted unreasonably under Section 312 (a) (7), the Commission articulated a new policy—one which based a determination of "reasonable access" on the "needs" of particular Federal candidates. Under this "customer is *always* right" theory,[3] a broadcaster would be unable to exercise the discretion afforded licensees by Congress. This discretion, enjoyed by broadcasters prior to November 21, 1979, the release date of the Commission's action, afforded networks and broadcasters the opportunity to gauge the needs of all candidates running for Federal office and to make decisions accordingly. Now, absent stay and prompt Commission reconsideration, that discretion will have vanished.

As an association of thousands of radio and television stations, NAB must emphasize here the detrimental

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[3] Here, the "customers" are political candidates for Federal office, and the "sellers" are stations which are licensed by a Federal agency which in turn depends on Federal officeholders for all its funding and jurisdiction. The stations under this scheme of enlarged governmental control lose their role as editors. The Supreme Court, in the landmark *CBS* v. *DNC* case, 412 U.S. 94 (1973), commented that "[r]egimenting broadcasters is too radical a therapy" and emphasized the importance of providing licensees with the utmost discretion: "For better or worse, editing is what editors are for: and editing is selection and choice of material." *Id.* at 124.

effect of the Commission's decision on individual stations, not just the networks. These adverse effects, measured in terms of restricted First Amendment rights and emasculated journalistic and programming discretion, will be imposed on individual station licensees. Indeed, a reading of the Commission's Opinion makes it quite clear that the agency did intend for its decision to affect individual stations, ignoring apparently the sharp constriction of stations' journalistic discretion.

The Commission interprets Section 312(a)(7) as applying to "the combination of licensees in a network" and asserts that networks act as "agents" for their affiliated stations. This interpretation apparently would bind every affiliated station to the broadcast of network-carried political candidates granted "reasonable access."[4] Of course, licensees have not abdicated their programming decisions to the networks. The Commission's view is contradicted by the actual economic and legal relationship between networks and affiliates and by the "public interest" standard of the Communications Act and the Commission's own rules requiring licensees to make programming judgments free of compulsion from any outside individual or entity. That is, in attempting to establish jurisdiction over the networks, the Commission has articulated a rationale that is inconsistent with well-established law and policy designed to keep programming decisions in the hands of licensees. The Commission implies a system of mandatory station clearance of political broadcast time sold by the networks. This view, of course, ignores the judgments of the individual licensees as to

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[4] The Commission's Opinion states that "networks sell time as a unit on behalf of their licensees to presidential candidates. In view of the fact that network licensees hold themselves out as a unit for economic purposes, they have no reasonable basis for complaining when subjected to the enforcement of Section 312 (a)(7)." (Memorandum Opinion and Order at 10.)

their weighing of several relevant factors in affording political broadcast time.

Not only would the public interest be disserved by mandatory local station carriage, but individual licensees would be deprived of the full due process of law that Section 312(a)(7) contemplates. In addition to this general denial of due process, the Commission's enforcement of Section 312(a)(7), through the networks, ignores the differing circumstances that are likely to exist at individual stations, such as the amounts of political time being sold by these stations locally to the same and other candidates.

Commissioner Robert E. Lee was right when he said, "the FCC is establishing a new principle of conditional candidacy." This decision means that henceforth every licensee must accept the claim of any person that he or she is about to become a candidate for Federal office. In reliance upon that claim, the Commission would require each licensee to sell at least thirty minutes of time per day to that individual. As a practical matter, the Commission's ruling in this matter would place every broadcast licensee under an obligation at direct variance with its journalistic responsibilities, in effect substituting the whim of any person with funds to purchase time for the thoughtful, balanced journalistic decision-making of the licensee.

We call the Commission's attention to the problems which may now confront a licensee in any major community. One example is that of Station WCCO(AM), in Minneapolis, Minnesota. Analyzing the station's situation under the most conservative methodology, there are a total of nine Congressional districts in the station's coverage area. In six of them, WCCO can anticipate a minimum of four bona fide primary candidates from each of the two major parties, for a total of 24 possible claimants for time. In the remaining three Congressional districts,

which are predominantly urban, the station expects a minimum of seven candidates for a separate total of 21. Because WCCO also covers part of Wisconsin, it could also be obligated under this decision to provide time to a minimum of four possible candidates for the U.S. Senate this year. Conservative calculations add 13 candidates for the Presidency, who may soon compete in the Wisconsin Presidential primaries. Thus, at least 62 persons might demand that a single licensee sell them substantial blocks of time. In some parts of the United States, notably in the tri-State New York City market, this problem would enlarge by geometric proportions.

WHEREFORE, for these reasons and those advanced by the other petitioners-movants, the Commission should reconsider its Order in this proceeding and deny the complaint. At the very least, the Commission should indicate clearly (1) that "reasonable access" will not be based solely on the "needs" of individual candidates, and (2) that individual licensees are not bound by the discretionary judgment of any network to carry a Presidential candidate's program.

Respectfully submitted,

NATIONAL ASSOCIATION OF
BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036

ERWIN G. KRASNOW

Stephen E. Nevas
First Amendment Adviser

BARRY D. UMANSKY
Counsel

November 26, 1979

[Certificate of Service Omitted in Printing]

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Complaint of

Carter-Mondale Presidential Committee, Inc.

against

The ABC, CBS & NBC Television Networks.

FURTHER STATEMENT OF CARTER-MONDALE PRESIDENTIAL COMMITTEE, INC.

This brief statement is being filed in response to the Commission's Memorandum Opinion and Order of November 26, 1979 extending the date for compliance with the Commission's prior Order in this matter to 5:30 PM, November 29, 1979.

Although described by the Commission as a *sua sponte* action, the Commission's Order in effect grants the stays requested by the networks for a three-day period in a case where time is of the essence. For the reasons expressed in our Novmber 23rd Opposition to Stay Requests (which have become even more critical at this point), any further stay will as a practical matter amount to a denial of the relief requested.*

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* Subsequent to the Commission's decision on November 20 and again after release of the Commission's Order on November 21, the Committee sought to negotiate with the networks for time on one of the requested evenings (December 4-7). The networks refused to negotiate at all. The Committee sought this time to coincide with the President's scheduled announcement of his candidacy on December 4. In addition, the Committee, of necessity, has now scheduled the more than 2,000 small-donor fundraising parties (*See*, Affidavit of Gerald M. Rafshoon attached to the Committee's Opposition to Petitions for Stay, at 6-7, ¶ 12), for December 4, the date of the President's announcement. Obviously, given its original

At this point, there is simply no reason why the networks should not provide the Committee with availabilities and demonstrate when they would comply with the Commission's order.* Particularly in view of the networks' absolute refusals to engage in any substantive discussions with the candidate's Committee to attempt to resolve this matter, denial of the reconsideration and stay requests is the only appropriate course of action for the Commission.

Notwithstanding the Commission's suggestion that the parties attempt to reconcile their differences (November 21 Order, p. 23 N. 34), the situation remains the same as before the Commission acted. The networks have simply maintained the positions which forced the Committee to file its Complaint one month ago. All three refuse to sell the requested half-hour time period. *NBC* refused to sell any time whatsoever.

CBS' counter-offer of two five-minute programs, one on December 8 at 10:55 p.m. and the other at an unspecified daytime period is completely unresponsive. This counter-offer is for a different program length and outside the days (December 4-7) and time period (8:00 p.m.-10:30 p.m.) requested by the Committee.

After our Complaint was filed, *ABC* represented to the Commission that it will make time available beginning with the first week of January, 1980. However, it has not offered to sell any time to the Committee, nor has it

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intent to have the parties coincide with the television program in question, the Committee's preference for airing of the show is now December 4. This date would still leave six days for the networks to seek judicial review.

* Nor can the Commission, as NBC suggests, permit a statement of refusal to comply to be deemed compliance with the Commission's instructions. See *NBC Request for Reconsideration*, p. 2.

specified the *length* of time it might be selling in January.*

The Commission's reconciliation efforts having been rejected by the networks, it is therefore encumbent on the Commission to act promptly and effectively to insure the integrity of its November 21st Order.

Respectfully submitted,

/s/ Timothy G. Smith
TIMOTHY G. SMITH
General Counsel
Carter-Mondale Presidential
Committee, Inc.
1413 K Street, N.W.
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Of Counsel:

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November 27, 1979

[Certificate of Service Omitted in Printing]

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* As far as the candidate's Committee is concerned, our only communication from ABC is its October 23rd flat refusal to sell any time.

LETTER FROM NATIONAL BROADCASTING COMPANY, INC.

NBC

National Broadcasting
Company, Inc.

1800 K Street, N.W.
Washington, D.C. 20006
202-833-3600

Howard Monderer
Law Department
Vice President, Law
Washington

November 28, 1979

Honorable William J. Tricarico
Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: Complaint of the Carter-Mondale
Presidential Committee, Inc.,
FCC 79-750.

Dear Mr. Tricarico:

In our letter to you of November 23, 1979, seeking reconsideration of the Commission's Memorandum Opinion and Order released November 21, 1979, there was a typographical error on page 4, footnote **, line 4. The footnote should have read as follows:

> "The NBC Television Network has, of course, provided the public with extensive coverage of and information about President. Since January 1, 1979, President Carter has made approximately 37 major appearances (speeches, messages, news conferences, interviews, etc.) on NBC. In addition, President Carter's picture or voice has appeared in approxi-

mately 115 reports in each of the (NBC Nightly News" and "NBC Today" programs since the beginning of this year."

We regret the error.

Sincerely yours,

/s/ Howard Monderer
HOWARD MONDERER

[List of Recipients Omitted in Printing]

FEDERAL COMMUNICATIONS COMMISSION

SPECIAL OPEN MEETING [*]

November 28, 1979

Agenda: Complaints & Compliance Item No. 1

ABC, CBS and NBC petitions for reconsideration and stay of decision in re Carter-Mondale Presidential Committee.

The above-entitled Item came on for discussion pursuant to notice, with Chairman, Commissioner Charles D. Ferris presiding, at 1919 M Street, N.W., Washington, D.C., in Room 856, at 2:04 p.m.

APPEARANCES:

Commissioner James M. Quello
Commissioner Robert E. Lee
Commissioner Abbott M. Washburn
Commissioner Joseph R. Fogarty
Commissioner Tyrone Brown
Commissioner Anne P. Jones

Also Present:

Richard J. Shiben
Lisa Margolis
Robert R. Bruce

[* This transcript was included in the Appendix filed in this case in court of appeals. Counsel for Respondents Federal Communication commission and United States of America have consented to its inclusion in this Joint Appendix, without prejudice to the Commission's general position, which it has taken in other cases, that the comments of Commissioners at open Commission meetings are not a part of the administrative record.]

PROCEEDINGS

(2:04 p.m.)

CHAIRMAN FERRIS: The meeting will come to order. The item of consideration this afternoon is the petitions by ABC, CBS and NBC for Reconsideration and Stay of the Decision in re. the Carter-Mondale Presidential Committee. Dick?

MR. SHIBEN: Mr. Chairman, Lisa Margolis has been working on this matter I think morning, noon, afternoon and night for the last four or five days. And I would like her to present it for the Broadcast Bureau.

CHAIRMAN FERRIS: Ms. Margolis?

MS. MARGOLIS: The Commission has received three petitions for Reconsideration and for Stay of its November 21st ruling from the ABC, NBC and CBS television networks. The Commission's order found that all three networks had acted unreasonably in refusing to sell time to President Carter in his capacity as a candidate for the Democratic nomination, and that they had thus failed to comply with Section 312 A7, the reasonable access of the Communications Act.

Specifically, the Commission found that the reasons that the networks gave for refusing to sell the time were deficient and that the networks had failed to give sufficient consideration to the desires of the candidate as to the best method of pursuing his media campaign. The three networks now argue that their decisions were reasonable, that they did in fact consider the needs of the candidate, and that reconsideration should be granted.

ABC and CBS contend that the Commission erred in focusing on the desires of the individual candidate. The petitions for stay allege that all three networks will seek judicial review of—will seek judicial review—in the event that reconsideration is denied. They also allege that programming disruptions may result in the absence of the stay.

The Carter-Mondale Presidential Committee alleges that it will be irrepairably harmed in the event that a stay is granted.

The Bureau recommends—the staff, rather, recommends—that all of the petitions be denied. The proposed memorandum and order clarify and reaffirm the Commission's original order. It clarifies the order as to the manner in which the Commission expects licensees to evaluate each individual request for time with which it is presented.

Also to the petitions for stay, we recommend that they also be denied. The networks have failed to satisfy the traditional criteria employed in determining whether a stay should be granted. Among other things, they have failed to show that they will be irrepairably harmed in the absence of a stay. Moreover, the Committee has made a substantial showing that it will be harmed in the event that a stay is granted.

Accordingly, we recommend that reconsideration be denied and that the Commission order the networks to inform it as to how they plan to fulfill their obligations to provide reasonable access to the candidate by the close of business November 29th, 1979.

CHAIRMAN FERRIS: Discussion?

(Pause)

CHAIRMAN FERRIS: The question? I would like to say one thing on an unrelated—I don't think it is appropriate normally to comment on extraneous reports. But there was an unfortunate story that appeared in a newspaper today, which I think—one thing one can question I think. A great contribution to societies, someone once said, if you lined up all the lawyers and shot them. I suppose one could say that one could line up all the headline writers and shoot them. But I think the story itself called into question the nature of the collegial body and any discussions between Commissioners on the merits of a particular item.

This one here mentioned certainly Commissioner Brown and my discussions on how this order or the record here and how an order one way or the other could be constructed. I think—I just think it is unfortunate that if anyone could interpret Commissioner Brown's contribution in this case as other than one that has been totally intellectually honest and very positive.

I must say that Commissioner Brown is probably one of the most intellectually honest persons I have ever met in my life, as well as probably one of the finest legal minds. And any contribution that he makes to any of our recommendations here is on the record and I think improves. And I think his contributions during this entire matter have been totally instructive, and I think have improved any of the items before us, in particular this one here.

So, as I said, I don't like commenting on outside reports from extraneous matters, but I do think, especially when one—a story could be interpreted—all of Commissioner's Brown contribution on this and any other matter. I think I just want to on my own raise that question and clarify that.

Now any discussion on the merits of the case?

COMMISSIONER BROWN: Mr. Chairman?

CHAIRMAN FERRIS: Yes?

COMMISSIONER BROWN: I certainly appreciate your comment. I am not concerned about what appears in the newspapers about this case. I am concerned about the decision that the Commission issues and that that decision be as strong as we can possibly make it, particularly in light of the importance of this case. And it is important, and the precedential value that it may have.

For that purpose, what appears in our decision for purposes of review by reviewing courts, if any appeals are taken, and for purposes of guidance of broadcasters

as they move into this and other election seasons is the more important consideration.

In that connection I want to emphasize that I feel that the staff, General Counsel's Office, and the Broadcast Bureau on this matter, since the issuance of our original order last week, and in light of the Petitions for Reconsideration that the Commission has received, have worked very, very hard, very diligently, and very skillfully to assure that any doubts about the Commission's intent in its original order have been clarified.

I must say frankly that, although I supported the original order, on reviewing the petitions for consideration I thought that there was a risk extant for our order to be misinterpreted. My office and I have been working with the staff of the Bureau to clarify our order to avoid those kinds of misinterpretations or misconceptions.

For me, this case on its facts has always been an easy case. A problem in a delicate area that involves balancing of First Amendment considerations, broadcasters, and rights of access for candidates is that the Commission needs to be extremely careful to be sure that its order doesn't go and that we have provided as much guidance to the licensees and to candidates that we possibly can.

I feel that with the clarification that is being issued today we have done just that. Further in that connection, I would like to point out that for me one of the very important parts of this case, one of the very important facts of this case, is that this was a first request—a first request by a candidate for broadcast time.

The Commission, majority of the Commission, had decided that the campaign for the Democratic nomination for President is actively underway today. Having made that decision, I simply fail to see how the Commission could then take the position that although the campaign is actively underway the broadcaster, here the networks, can turn down a very early—in the sense of

giving the networks plenty of time to adjust their schedules, if that is necessary—very timely, first request for a segment of broadcast time.

In all of these cases we are going to have to—the broadcaster is going to have to initially—balance factors that weigh in favor of granting accesses requested by the candidate, and factors that mitigate against it.

The circumstances of this case, considering that this is a first request and considering also that that request was made more than two months prior to the time that was sought, I simply fail to see how the Commission could rule otherwise than that a failure to be more responsive did not comport with the requirements of the statute.

COMMISSIONER WASHBURN: Can I ask the Commissioner a question? What is the magic of this first request? I notice in the document as rewritten the second request doesn't get as much attention, or the broadcaster said he doesn't have to pay as much attention to the second request. I would think that should get even more attention under your rationale, because that shows that the battle is going on even stronger. Why does the second request get less attention, and what is the magic of the first request?

COMMISSIONER BROWN: The magic of the first request, in my judgment, is that among the factors the broadcaster has every right to consider when a candidate requests time is how much time has that particular candidate received from that particular broadcaster in the past? How recently have requests for time been made and granted?

There is nothing on that part of the scale in favor of the broadcaster if the reasonable access period has attached in terms of Section 312 A7, and yet no time has been granted by the broadcaster. So that is the magic that I attach to that particular. There is simply no element on the side of the broadcaster as far as having received repetitive requests from a particular candidate.

CHAIRMAN FERRIS: I think the magic of the second request as well if the first request is honored, which demonstrated that there wasn't a—

COMMISSIONER BROWN: That is correct.

CHAIRMAN FERRIS: —Pavlovian response to requests generally.

COMMISSIONER WASHBURN: Say that again?

CHAIRMAN FERRIS: Well, the fact that you had a second request after you had time the first time demonstrated that at least you got time the first time and that there wasn't an attitude on the part of the network or the broadcaster from the standpoint of having a total rigidity to these requests and a policy of total denial.

So I think—

COMMISSIONER WASHBURN: So they don't have to pay as much attention to the second request.

CHAIRMAN FERRIS: Of course they do. Oh, I think they pay—but the values in weighing, the process of weighing, is an ad hoc one in each case. And I think the fact that the first request was honored and there was time I think is part of the new chemistry in your evaluation of the second request.

COMMISSIONER BROWN: The broadcaster, Commissioner Washburn, I would hope certainly, and certainly our intent, would pay attention to every request. The question is whether or not a negative response to a particular request be considered reasonable in the light of all the factors. And one factor that does not weigh in the favor of the broadcaster with respect to the first request is that he has had repetitive requests from a particular candidate.

Here there have been no repetitive requests for time. It is as simple as that.

COMMISSIONER LEE: I don't believe that I disagree with Commissioner Brown with respect to having made the decision that the campaign is one. The rest may be easy. I just question our expertise to decide that

we are the experts as to when a campaign is on for purposes of triggering the Act.

I think that probably we haven't heard the last of this, and I was wondering could the networks sell less time than one-half hour under this decision now? Suppose they come back and say 15 minutes. Is 30 minutes now the magic number?

MR. BRUCE: The response is up to the networks. We have ruled on their—on their offer, which we found to be unreasonable.

COMMISSIONER LEE: Well, could they offer time on dates any than the December 4th—was it 4th, 5th, 6th, or 7th?

MR. BRUCE: I think that that is—you know, again I am not trying to be evasive about it, but I that our action is limited to finding that their offer as made was unreasonable. And I don't think the Commission is in the position of prescribing precisely what action the networks will take in response to that action.

COMMISSIONER LEE: Do you consider that this decision is an extension of 312 A7 or—

MR. BRUCE: No, I think it is the first attempt to try to—to develop a way of applying this statute in a fair and even-handed manner, balancing the competing First Amendment-related concerns of broadcasters and candidates and the public.

And I think that to the extent that this decision has required us to wrestle with some of the difficult issues we have moved forward in trying to give some meaning to statutory obligations that Congress imposed. And I think obviously it appears that this action will be subject to judicial review and will have further clarification of the state of the law in this area. And I think that is to be very much desired by the Commission in trying to carry out its obligations that have been imposed by the Congress.

COMMISSIONER LEE: Under this decision could the Committee request a half an hour on all three networks in prime time?

MR. BRUCE: Well, I think that the nature of the request by the complainant was for time on one of the networks.

I think—I think under this decision they have made requests of each of the networks, but the record of this proceeding suggests that they do not want to buy time on all of the networks, only one one.

COMMISSIONER LEE: If one network is decided on, that triggers 315 only with respect to that one network.

MR. BRUCE: That is correct.

COMMISSIONER LEE: So that the ultimate action triggering 315 is really a Government decision. We have said do it, and the effect is to hurt the network unless time is requested on the other networks by other candidates.

Mr. BRUCE: Well, I don't—I don't know that it—the action can be characterized as hurting the networks. I think that obviously candidates have the option of making requests of other networks as well.

COMMISSIONER LEE: The opinion, assuming that one-half hour is required, the option is then with the Committee as to who is the Lucky Louis of the three networks.

MR. BRUCE: Well, I think it takes two to tango in this area and—

COMMISSIONER LEE: It might take three in this case.

MR. BRUCE: Well—

COMMISSIONER LEE: I don't think I have any further comment. I will have a dissent.

COMMISSIONER JONES: I would like to just comment on something that Commissioner Brown said about, you know, the first request has nothing to weigh in on

the broadcaster's side. I would like to suggest that you have to weigh in on the broadcaster's side the existence of many other candidates and the fact that Section 315 will be triggered.

I don't think we can sit here and say that they have a request simply by one—well, "candidate," and I am using that word loosely. because I think that is another very important question that is present in this decision, but that there is a qualifying candidate who has made this request.

But in any event we can't say simply that there is—they have been—approached by one candidate. They are faced with the fact that, if they sell time to this one candidate, there are—I don't know what the number was on the item, but let's say—let's be very conservative and say—at least 12 other people who will then have the right to equal time, which I find something that if I were a broadcaster I would certainly weigh in, especially considering the fact that we might find that the reasonable time for them is in a time frame which would completely disrupt broadcasting for the entire month of December or—

COMMISSIONER BROWN: We are not—we don't have that case before us. If we did—

COMMISSIONER JONES: I think we have the case.

COMMISSIONER BROWN: If—

COMMISSIONER JONES: We have the case. We don't have the—you speak of the actuality of requests by candidates. I think that is carrying it too far. I think the fact that they have the right to request is something that a businessman must consider.

COMMISSIONER BROWN: But a businessman faced with that difficulty and this Commission faced with that difficulty is not powerless to do anything about it. If as a result of the action that we take today, or some future action, broadcasters are faced with a real multiplicity of actual requests for broadcast time, paid politi-

cal time, the broadcaster has every right—and it seems to me acting as a reasonable licensee or network—to take those requests in consideration in deciding how it will respond to the request for reasonable access. And it seems to me that this Commission also must take that fact into consideration in reviewing the broadcaster's action.

But to speculate at this point that, based on the right of access the networks are going to be faced with a host of—315 requests—and then try to deal with that situation now, before we have faced it, it just seems to me gets us into a morass.

COMMISSIONER JONES: Well, I think we have the fact of the right attaching. And then we, as a Commission, are speculating that not many requests will come in. I think we are the ones who are engaging in speculation, which I find—

MR. BRUCE: Well, I think Commissioner Brown has responded to your question the way I would have, which is the record before us does not indicate that there are likely to be multiple requests. Indeed the record—

COMMISSIONER JONES: You don't know that, right?

MR. BRUCE: The record is devoid of any—

COMMISSIONER JONES: Of—

MR. BRUCE: —any indication by—

COMMISSIONER JONES: —other candidates aren't in there.

MR. BRUCE: —the networks that there are contingent requests for time if the Carter complaint is granted.

COMMISSIONER JONES: But the right does, you would agree that—

MR. BRUCE: That is right, but I think that this decision holds that the theoretical right is not sufficient, and we should be looking at the record to demonstrate whether it is likely that all—all 11—candidates will ask for time on all networks. What—

COMMISSIONER JONES: I think it is 122 candidates or something.

MR. BRUCE: Well, there are I think 11 candidates in the major parties.

COMMISSIONER BROWN: I would be willing to say that this opinion would not apply to the situation in which a single network is faced with requests from 112 candidates for time. I don't think I would be going too far out on a limb.

COMMISSIONER JONES: Well, no, it applies. It applies because it applies once they sell to one. Then the right attaches. What you are saying you might not make them have all 122 on—

COMMISSIONER BROWN: I probably would not—

COMMISSIONER JONES: —for a half hour in December.

COMMISSIONER BROWN: I probably would not reach the same result. That is correct.

CHAIRMAN FERRIS: I think the question of what is reasonable action on the part of the networks is an ad hoc determination that you make. If the network that granted time in this was petitioned by 122 and they were unable to accommodate the 122 or the 3rd and the 4th and the 5th in the month of December and it came back to us, we would have to make a determination as to whether they were reasonable in each instance of saying yes or no.

COMMISSIONER JONES: I am really suggesting that on the side of the broadcasters we have to weigh in the fact that a right of equal opportunity attaches to other candidates, the right. So I think there is something to weight, and I would not in my judgment think a request for time is simply the right, is something that should be weighed on the broadcasters.

And I am back where I was the first time, and I am not going to beat a dead horse you will be happy to know.

CHAIRMAN FERRIS: No. I think that right is weighed fully in the order that has been represented to us. I think that is a fact that is considered.

COMMISSIONER BROWN: Mr. Chairman?

CHAIRMAN FERRIS: Yes?

COMMISSIONER BROWN: I just—to mention specifically some of the concerns that I had about the order, based on the petitions for reconsideration. The arguments were made that the Commission in its original order had given total control to candidates to decide whether and when and how much time they would receive over the air, I don't read our original order that way, and I think that to the extent that some might have read it that way, it certainly is clear from the clarification in today's order that the Commission had no such intent.

I think it is also clear from today's order—and again we did not have this intent originally—that broadcasters are required to take into account the subjective, political position of candidates, one candidate, for example, feeling that he or she may have just lost in New Hampshire or is falling in the polls and therefore that candidate must have time tomorrow to address the national audience, that kind of thing.

This order makes it clear that we are not asking broadcasters to take those kinds of considerations as relevant for purposes of reasonable access. What we do require all broadcasters to do is to look at each request on the basis of the particular request that is made and not to make a blanket—to take a blanket approach to the question of granting access to candidates for political office.

I think on that basis that the order that the Commission has issues in this matter will make it possible for candidates and broadcasters to live with Section 312 A7, and both taking honest and bona fide approaches to make it work, that the statute will work.

The American people will benefit from that.

COMMISSIONER QUELLO: I think we are going to have an opportunity to see whether this really works or not, but I think Commissioner Jones has a real point. You are going to trigger other requests. However, if you get to the point where this gets to be unfeasible or unworkable, why finally maybe they will get around to my original position for the last three years, and that is that Section 312 A7 should be abolished. But that is going to be a legislative move, not our move.

It is still on the books. It requires more access as opposed to less access. And I—I don't see a basis here for reconsideration.

CHAIRMAN FERRIS: Commissioner Washburn

COMMISSIONER WASHBURN: Mr. Chairman, paragraph 43, page 17, the summary section, says "we believe that Section 312 A7 can not be implemented reasonably if either of the interests of broadcasters or candidates are allowed to become pre-eminent, for if we accord controlling weight to candidates' needs and interests, there is a serious potential for impinging unduly on broadcasters' discretion. At the same time if we interpret the statute so as to afford broadcasters essentially unlimited discretion with respect to access issues, needs of candidates and of the electorate may be given short shrift." And elsewhere he talks about this delicate balance between these two interests.

And yet, as you read the order, it does put a dominant amount of attention and interest upon the needs of the candidate. It is written that way. It is the needs of the candidates emerge as the controlling element here. I don't think you can read this any other way.

And this is contrary to our 1978 analysis of 312 A7, in which we said that there are three criteria that broadcasters should consider. One is the timing and unavailability of particular classes of time. Two is the multiplicity of candidates. Three is the needs of candidates.

And what this order does is elevate that number three to the overriding criterion here. And this is a very unfortunate thing, I believe. It destroys the balance that is so rightly described here in the summary that I—paragraph 43 that I—read.

I think of all the legal problems involved here the most troublesome one by far is this question of the FCC interfering with the discretion of the broadcasters and substituting its judgment for theirs. And there is a whole groups of paragraphs here, paragraph 31 through 35 on pages 12 and 13, which do exactly that. They tell the broadcasters how to consider the individual requests of candidates. They spell it out, so that the Commission's judgment is substituted for the good faith judgment of the broadcasters. And I think this is very dangerous and unnecessary and unfortunate, but this is the consequence of this order. And it is going to rise to haunt the Commission and the public in years to come in future campaigns, because you will have arguments of when, quote, "a campaign is in full swing." And you will have court cases around this. You will have candidates coming in in mid-summer and quoting this document to the Commission and saying: "You said it was the candidates' needs that were uppermost. We say the campaign is in full swing. I am a candidate. I have six other people that are against me in the primaries. It is summer. The campaign is underway." Broadcasters will say: "It is summer. The campaign is not underway. The campaign will not be underway until next January." But they will have to give that candidate the time.

I think the thing is totally wrong and unfortunate.

CHAIRMAN FERRIS: I just want to say that I think it's an extraordinarily well written order. It's a great improvement, I think, over the original order. I think it demonstrates that the petitions for reconsideration were considered; they were—and the points of view were considered. And I think we—the order that is pre-

sented here demonstrates the honesty of those considerations and meeting them on the merits.

I just want to say that I think it's a job extraordinarily well done by all of you.

COMMISSIONER WASHBURN: Could I ask a question of the staff, or, indeed, of my fellow Commissioners?

What would you have said to Mr. Connally, if he had come in July and said, I have x number of opponents in the race. I want time.

MR. BRUCE: I think what the—

COMMISSIONER WASHBURN: And this document was in existence?

MR. BRUCE: Commissioner, I didn't want to respond at length to your comments because I would respectfully submit that the document does not have the effect that you suggest.

But I think that it does not clearly make the candidates' appraisal of whether the campaign is under way controlling. I think that's very clear. It was clear in the original order. I think it's clear on this order, on reconsideration.

I think that we treat the question of whether the campaign is under way as a question of whether 312 A 7 rights and obligations attach. And that is an area that is within the Commission's responsibility. It's a determination that was made in the original order on objection criteria and I think, certainly, what the order suggests is that making that independent appraisal, the Commission would take into account representations included in the candidate's complaint, or, indeed, the broadcaster's own view.

But I simply disagree with your reading of the order, that it makes that question of 312 A 7 obligations attaching one that is within the discretion of the candidate.

COMMISSIONER FOGARTY: Mr. Chairman?

CHAIRMAN FERRIS: Yes?

COMMISSIONER FOGARTY: This petition for reconsideration gave us an opportunity to tighten up the original order. And I want to specifically thank the General Counsel, Mr. Bruce, for his contribution, working with my office and making this a, I think, a far more cogent order than the original one, which we issued. And I fully support it.

COMMISSIONER WASHBURN: Going to what you said, Mr. General Counsel, paragraph 33 spells out what the broadcasters can't do in looking at candidates' needs. "We specifically eschew any intention of requiring broadcasters to make an assessment of individual candidate needs insofar as they solely relate to the candidate's subjective, personal, or immediate political desires.

We do not intend to place broadcasters in the position of evaluating the political importance or urgency of individual candidate needs in terms of particular candidate situation in a campaign, where he stands in the polls, or how he has fared in specific primaries.

Well, what can the broadcaster do? We have specifically noted that a broadcaster should not second guess the political wisdom or relative audience attracting effectiveness of longer versus shorter formats. In other words, the broadcaster can't second guess the wisdom of the candidate or the candidate's media expert. He simply has to take that.

Such judgments are best left to the discretion of the candidate and his media advisor. Moreover, we shall look with concern upon evidence that broadcasters have not demonstrated proper restraint in evaluating the candidate's requests."

And then they talk about how CBS didn't do this.

MR. BRUCE: Commissioner, the—

COMMISSIONER WASHBURN: I can't see how you can read that otherwise and just say the candidate just rolls over—the broadcaster just rolls over and takes what the candidate wants.

MR. BRUCE: The portion of the order that I think addresses the question of 312 A 7, Rights, Attaches, in paragraph 28, and not in the subsequent paragraphs. And I simply think it's clear there that the threshold question of whether 312 A 7 Rights Attaches to be made was made, and is to be made on the basis of the Commission's independent evaluation of the status of that public campaign. And taking into account what the broadcaster says and what the candidate says in his complaint.

And I think that read together and in context, these paragraphs address that the candidate's interest is not controlling. I think the portions of the order that you, yourself, read that indicated an awareness that a balancing is involved, I think do reflect the general thrust of the order.

I think it's clear that we have construed the statute in a way that provides broadcasters substantial leeway as to the amount and the timing of opportunities that are to be made. I think that that is implicit in the weighing factors that are taken into account.

The candidates' needs factor is simply one countervailing factor to interest that the broadcaster can weigh in deciding whether or not to be access requests.

And we have also, I think, from a procedural standpoint, dealt with this complaint in a way in which we are dealing with the broadcaster's own explanation of his reasons for acting on the complaint.

And I think that—that procedural approach to these cases, as well, reflects, I think, a real sensitivity on the Commission's part to not intruding itself into and substituting its own judgment for that of the broadcaster.

But the fundamental problem is, as long as there is a statute on—that the Congress has enacted that imposes reasonable access obligations, this Commisison has an obligation to enforce that statute. And there will be oc-

casions in which the Commission finds those obligations have not been fulfilled.

And when that happens, the—necessarily, because of the Congress decision in adopting that statute, the effect will be to override a judgment that the broadcaster has made. The Congress's intention was to provide some method of accountability to balance competing constitutionally effective interests here.

And the Congress apparently concluded that there was more than one First Amendment interest at stake, not merely the interest of maintaining the broadcaster's editorial independence, but also interest in encouraging political speech and in the interests of the public in being informed on important issues before the electorate.

MR. BRUCE: I'm glad that Commissioner Washburn quoted in full from paragraph 33. It's one of the sections that I asked be included in the opinion.

And I would—what I wonder is whether the Commissioner would be more satisfied if the Commission took the position of requiring broadcasters to make an assessment of individual candidate needs insofar as they relate to the candidate's subjective, personal, or immediate political desires. Is that the—is that what we should affirmatively require of broadcasters?

COMMISSIONER WASHBURN: Of course not.

MR. BRUCE: Then I was—I was wondering, then, what your concern with that point was.

COMMISSIONER WASHBURN: My concern—

MR. BRUCE: That's not language in which we're requiring broadcasters to do something. It's language which we're making it clear that we are not requiring broadcasters to do something.

COMMISSIONER WASHBURN: Those two—the whole thrust of those paragraphs on those two pages are—I don't see how they can be read by any impartial person except to say that we're elevating the needs of the candidate to be the overriding element here.

MR. BRUCE: Commissioner, I think the purpose is to assure that those needs, not are elevated, but they are not ignored.

I would state it in those terms. And I think we are trying to achieve a balance. Whether or not this approach that we've formulated achieves that balance, I think it's a question that will be resolved on review by the courts.

But we simply have a responsibility under the statute to balance competing interests, and I think this reflects the Commission's best effort to interpret that statute, to serve these competing, important interests.

COMMISSIONER WASHBURN: I have one other question and then I'll subside.

Page 34—paragraph 34 on page 13, in the middle of that paragraph reads, "For example, a candidate might request an opportunity to discuss a comples set of issues important to the electorate, which he believes cannot be accomplished through spot announcements on short program requests. In our view, Section 312 A 7's goal of encouraging electorate informing discussion requires a broadcaster to take into account this aspect of the individual candidate's request."

Well how does that square with Section 315, which forbids broadcasters to examine content of political broadcasts?

MR. BRUCE: I don't think—

COMMISSIONER JONES: When—go ahead.

MR. BRUCE: Well, I just think I will comment and say that I don't think that contemplates that the broadcaster is to conduct any sort of a review of the content of a broadcast.

What we're simply talking about is that they take into account some of the objective indicia of the request, such as the fact that a candidate says he wants to make a sustained exposition of views.

It doesn't say that the candidate—the candidate's desires are to be honored in that case. It just says that, in that limited respect, the broadcasters offer should be reasonably related as possible to the nature of the request.

And consider it in the overall context—and you have to add this caveat—fo weighing what the overall consequences are of grant of that major block of time.

If it turns out that an opportunity for a sustained exposition is requested by a candidate but there is the likelihood of competing other requests for time, the broadcaster can take that into account in denying that opportunity for sustained time.

So I—I think that these are consistent points. And I think they are set out in full in the order. And I think the order really has to be examined in its entirety and—because I think it does reflect an attempt to deal with some very difficult problems.

COMMISSIONER JONES: You would not find that inconsistent, that idea of, you know, the long block of time with some competing requests? You would not find that inconsistent with the statement in 33 that broadcasters should not second guess the wisdom or relative audience attracting effectiveness of longer versus shorter format?

MR. BRUCE: I'm sure what that—I don't think that's inconsistent, Commissioner, in the sense that that latter comment referred to, I think, a concern that a candidate might—that a broadcaster might get itself in a position, as indeed, one of the networks did in this case, of suggesting that a candidate was unwise in wanting a half hour spot—

COMMISSIONER JONES: And youmake that clear in the footnote. But the statement in the paragraph is pretty sweeping.

MR. BRUCE: Well I think that the footnote is probably the necessary clarification. And the kind—the ex-

ample of that is the situation where broadcaster comes in and says—implies that the candidate is unwise, because, in fact, a five minute segment of time would attract 67 percent more viewers than a half hour slot. That strikes me as being a wholly irrelevant factor for the network to consider.

From the network's standpoint, it may be very significant; how many viewers are watching. From a candidate's standpoint, he may be less interested in the total number of viewers than he is in the number of people who are willing to stay with his exposition of ideas for a shorter period of time.

So we're simply saying that that kind of second guessing of a candidate's preference is not a relevant factor. And so we're simply trying to give some guidance as to how these requests should be dealt with. And I think that has to be dealt with with these other matters in the context of the whole order.

CHAIRMAN FERRIS: Further discussion. The question is on the adoption of the memorandum, opinion and order denying the petition for reconsideration by ABC, NBC, and CBS and the denial, as well, of their petition for stay of the original order. All in favor, say "Aye".

(Chorus of "Ayes")

CHAIRMAN FERRIS: Opposed, "No".

(Couple of "No's".)

CHAIRMAN FERRIS: The ayes have it. So ordered. Any further business?

MR. BRUCE: I'll have a separate statement that—to be issued with today's order.

COMMISSIONER WASHBURN: I'll have a separate statement to be issued with today's order.

COMMISSIONER LEE: I'll have a statement.

CHAIRMAN FERRIS: Any further statements?

I'll stand by the text of the order.

I believe you have some minor editorials that don't change any substance. I'm going to have the order out this afternoon, within an hour.

MR. BRUCE: Yes. I'm going to try to do that. And I've mentioned that fact to all the members.

CHAIRMAN FERRIS: That authority is greeted for those minor editorials.

The Commission is adjourned.

(Whereupon, the proceedings, as described above, were adjourned at 2:48 P.M.)

V

ORDERS OF THE UNITED STATES SUPREME COURT GRANTING PETITIONS FOR WRITS OF CERTIORARI

SUPREME COURT OF THE UNITED STATES

No. 80-207

CBS, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ORDER ALLOWING CERTIORARI

Filed November 3, 1980

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

The case is consolidated with Nos. 80-213 and 80-214 and a total of one hour is allotted for oral argument.

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SUPREME COURT OF THE UNITED STATES

No. 80-213

AMERICAN BROADCASTING COMPANIES, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ORDER ALLOWING CERTIORARI

Filed November 3, 1980

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The case is consolidated with Nos. 80-207 and 80-214 and a total of one hour is allotted for oral argument.

SUPREME COURT OF THE UNITED STATES

No. 80-214

NATIONAL BROADCASTING COMPANY, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ORDER ALLOWING CERTIORARI

Filed November 3, 1980

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